IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1272

GEORGIA POWER COMPANY,
Petitioner,

vs.

CIMARRON COAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, GEORGIA POWER COMPANY, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 9, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix A, *infra*, pp. A1-A13) is reported at 526 F.2d 101 (6th Cir. 1975). The opinion and judgment of the district court in this case (Appendix A, *infra*, pp. A14-A24) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 9, 1975 and this Court has jurisdiction under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I. Whether a claim arising under a contract which expresses an intent to consider matters at a future date is a nonjusticiable issue which cannot be the subject of judicially imposed arbitration?

II. Whether the parties in this commercial agreement excluded from arbitration claims arising under section 26.01, the "gross inequities" provision?

STATUTES INVOLVED

This case involves The Federal Arbitration Act of 1925, 9 U.S.C. §§1-14 (1970), and particularly §2 thereof, which section is set out below:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

On or about February 6, 1969, Petitioner, Georgia Power Company ("Georgia Power") and Cimarron Coal Corporation ("Cimarron") entered into a long-term Coal Supply Agreement, (App. B1-B34). This agreement, as amended, calls for total shipment of approximately 26,600,000 tons of coal as specified in the contract. (App. B46). During the period 1970-1974, several price increases were granted under the cost escalation provisions in the contract, based on increased costs in production and delivery, so as to insure profitability of the agreement to Cimarron. The original contract price of $4.03 per ton (App. B2) more than doubled to $10.41 per ton by November of 1974.

In 1974, Cimarron unilaterally demanded an increase in the contract price of approximately $17 per ton for approximately 20 million tons of coal, pursuant to §26.01 of the agreement, the "gross inequities" provision. (App. B19). Cimarron claimed a "gross inequity" existed, because other suppliers of coal on the "spot" or "short-term" market were selling coal for as much as $29 to $32 per ton during that period of the energy crisis. Cimarron requested that its price demands be arbitrated, but Georgia Power responded that claims made under §26.01 were not arbitrable, because the clause was permissive and not mandatory.

Cimarron never initiated arbitration proceedings or court action seeking an order for arbitration. Neither did the parties ever mutually agree that a "gross inequity" existed, or agree to a resolution of Cimarron's claimed price increase.

On November 1, 1974, the eve of a national coal miners strike, Cimarron, a non-union company, issued an ultimatum that it would cease delivery of coal under the agreement, unless Georgia Power agreed to pay a price increase of over $340,000,000 for the total tonnage to be delivered during the remaining life of the agreement. Georgia Power refused to pay the demanded price increase, and Cimarron ceased delivery of coal on November 5, 1974.

Georgia Power then initiated a diversity action in the United States District Court for the Western District of Kentucky for specific performance of the contract and for a declaratory judgment on the arbitrability of the demanded price increase under §26.01. On November 21, 1974, the district court entered a status quo order whereby both parties are required to continue performance of their respective obligations under the agreement until the case has been finally determined on appeal. (App. A23-A24). After a hearing on the merits, the trial court entered a judgment which ordered, among other things, the parties to arbitrate Cimarron's claim under §26.01, and which maintained in effect the status quo order previously entered. (App. A21-A22). The Court also entered an Opinion of Findings of Fact and Conclusions of Law. (App A14-A20).

On appeal, the United States Court of Appeals for

the Sixth Circuit affirmed the trial court's judgment. (App. A1-A13).

By application for a Writ of Certiorari, Petitioner seeks review of the Sixth Circuit Court of Appeals' decision regarding the arbitrability of Cimarron's claim under §26.01 of the agreement.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Court should review the decision of the United States Court of Appeals for the Sixth Circuit because that Court has decided an important question of federal law which has not, but should be settled by this Court, and has rendered a decision in conflict with an earlier decision of the Second Circuit Court of Appeals. The Sixth Circuit, in affirming the district court's decision, held that a contract clause which provides that gross inequities resulting in unusual conditions not contemplated by the parties "may be corrected by mutual consent,"[1] was arbitrable under a broad arbitration clause covering "any unresolved

1. § 26.01. *Adjustments for Gross Inequities.* Any gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of the execution of this Agreement may be corrected by mutual consent, Each party shall in the case of a claim of gross inequity furnish the other with whatever documentary evidence may be necessary to assist in affecting a settlement.

Nothing contained in this section shall be construed as relieving either the Purchaser or Seller from any of its respective obligations hereunder solely because of the existence of a claim of inequity or the failure of the parties to reach an agreement with respect thereto.

controversy . . . arising under this Agreement."[2] In so holding the Sixth Circuit extended the types of matters which are referable to arbitration further than any other court, including this Court, has ever done before.

Since the passage of The Federal Arbitration Act, 9 U.S.C. §§1-14 (1970), in 1925, this Court has had relative few occasions to consider problems arising under the Act in a commercial context. The last major statement made by this Court in a commercial arbitration context was the decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*, 388 U.S. 395 (1967). There the Court established guidelines for determining the arbitrability of the question of whether a valid agreement to arbitrate exists. The Court held that under a broad arbitration clause, a claim of fraud in the inducement of a contract (to be distinguished from a claim of fraud in the inducement of the arbitration clause) is an issue to be determined by the arbitrators and not by the judiciary. The Court was not faced with the question raised by this case of how courts should construe commercial agreements to determine whether a particular dispute is arbitrable under an admittedly valid arbitration agreement. More particularly, the Court has never ruled on the question presented by the instant case of whether in order to exclude a matter from arbitration, specific,

2. § 20.01. *Arbitration.* Any unresolved controversy between the parties, arising under this Agreement shall, at the request of either party, be submitted to arbitration under the rules of the American Arbitration Association. The cost and expense of any arbitration shall be shared equally by the parties, unless otherwise ordered by the arbitrator.

express terms must be used, or whether more general terms indicating an intention to withhold from arbitration are suitable. *See Strauss v. Silvercup Bakers, Inc.*, 353 F.2d 555, 557 (2d Cir. 1965); *El Hoss Engineering & Transport Co. v. American Independent Oil Co.*, 289 F.2d 346 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961).

The Sixth Circuit's decision erroneously permits a party to obtain a remedy through arbitration which could not be obtained through judicial proceedings. A court will not attempt to fashion an agreement where the parties have agreed that in the future they would attempt to mutually agree to a price revision. *Beech Aircraft Corp. v. Ross*, 155 F.2d 615 (10th Cir. 1946). Yet, as a result of the Sixth Circuit's decision, a nonjusticiable controversy like that produced by the gross inequity clause is subject to arbitration.

It has been almost ten years since the Supreme Court last examined the area of commercial arbitration. In the *Prima Paint* case the Court considered the arbitrability of a dispute as to whether a valid agreement to arbitrate was entered into. This case presents the next step in judicial analysis with respect to arbitration — whether the dispute between the parties is legally arbitrable — and provides the Court with an excellent opportunity to provide much needed judicial guidance in the area of commercial arbitration. In this case the parties expressed a definite intent to correct gross inequities through "mutual consent" rather than through judicial proceedings or arbitration. If a more specific provision excluding a dispute from arbitration was needed, and will be needed in the future to effectuate the intention of the parties,

this Court should establish guidelines providing accordingly.

DISCUSSION OF QUESTIONS

I.

A Claim Arising Under a Contract Provision Which Expresses an Intent to Consider Commercial Contingencies at a Future Date is a Nonjusticiable Issue which Cannot be the Subject of Judicially Imposed Arbitration.

This case presents a question left unanswered by *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), that is whether parties can exclude matters from arbitration by contract language demonstrating an intent to reserve such issues for resolution by the parties. *See id.* at 402-403 n.9; Note, *The Consequences of a Broad Arbitration Clause under the Federal Arbitration Act*, 52 BOSTON U.L. REV. 571, 595 (1972). The decision by the Sixth Circuit Court of Appeals in the instant case illustrates that courts have become "lost in the shadow of rigid 'arbitration worship' dicta" of cases proselytizing policy favoring arbitration in collective bargaining agreements, such that there has been a dramatic and harmful departure from the neutral principle that courts can order parties to arbitrate only matters they have agreed to arbitrate. *See* Heiner, *Express Exclusions from Arbitration—Accommodating the Consensual with the Nonconsensual*, 1 GA. L. REV. 363, 368 (1967). There is a need to refocus on the basic premise that:

> The duty to arbitrate being contractual in origin, the Court must make an effort to construe the extent of the contractual duty, rather than enforce arbitration even of arbitrability upon parties who do not bind themselves to such a submission.

Strauss v. Silvercup Bakers, Inc., 353 F.2d 555, 558 (2d Cir. 1965).

The gross inequities clause, §26.01, has a special purpose in this commercial contract between Georgia Power, a regulated public utility, and Cimarron, a coal supplier. At the trial of this case, it was shown that Georgia Power, like other electric public utilities, has a fuel adjustment clause in its rate structure that passes added fuel costs on to the consumer. The gross inequities clause is merely a written declaration that the parties to the long-term coal supply agreement recognize that if unanticipated contingencies occur, one of the parties may find it in its best interest to grant the other party relief that is not called for under the contract. Section 26.01 provides a statement of policy which will allow the public utility the opportunity to grant relief to a troubled coal supplier, hopefully without incurring the wrath of a public service commission or the public if it surrenders "too good a deal" in the public interest. Such a clause was never intended to require the public utility to enter the free-wheeling environment of an arbitration proceeding, with a supplier who entered the contract with a net worth of less than one-half million dollars in 1969 and made a profit of over 3 million dollars in 1974, in order to defend against an open-ended demand for a price increase of approximately $340 million.

The language of §26.01 expresses the clear intent that an unforeseable economic condition *may* be cor-

rected by *mutual consent* of the parties, but it does not mandate any settlement. Neither a court nor an arbitrator can resolve a claim under §26.01, because that would constitute "making" the agreement for the parties. An arbitrator is limited to effectuating the intent of the parties within the contractual language of the agreement, and may not impose new terms on the agreement.[3] An arbitrator, therefore, cannot *make* terms for agreements which the parties never intended to have made for them by extraneous authority. In the instant case, the parties clearly and expressly never intended any change to be made in the contract pursuant to §26.01, *unless* made by mutual consent. *See El Hoss Engineering & Transport Co. v. American Independent Oil Co.*, 289 F.2d 346 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961).

The courts, and not the arbitrators, must determine whether or not a party is bound to arbitrate a particular dispute, based on the contract entered into by the parties. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). Section 26.01 clearly does not provide a justiciable issue for an arbitrator or a court to adjudicate, and therefore is not arbitrable. There is no basis for a determination of whether the parties would have considered Cimarron's claim to be a "gross inequity"; or whether the parties would have corrected

3. In the context of a labor agreement, this Court recently said: "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties." *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 53 (1974). "The arbitrator has authority to resolve only questions of contractual rights," *id.*, and cannot dispense his own brand of justice. *See United Steelworkers of America vs. Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960).

such claim; much less an indication of how the parties would have agreed to correct such claim. Since a court cannot impose terms of a contract which were not agreed to by the parties, *Beech Aircraft Corp. v. Ross*, 155 F.2d 615 (10th Cir. 1946), a court may not order an arbitrator to impose such unintended terms on the parties.

Prior to the decision of the Sixth Circuit in the instant case, the only Circuit which appears to have addressed the issue presented by this case was the Second Circuit. In *Necchi S.p.A. v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 698 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966),[4] the Court held that a contractual provision which provided that six months before the expiration of the agreement the parties "shall examine the possibility of executing a new and, it is hoped, long term distributorship agreement for the same territory and at such terms and conditions as will be then discussed and defined" was not arbitrable. Speaking through Judge (now Justice) Marshall the Court said, "Certainly we cannot ask that a renewal contract be written for the parties, as it is altogether too conjectural that the parties would have agreed and on what terms." This conclusion was reached even though the agreement contained an arbitration clause as broad as the one in this case.

4. The Second Circuit's opinion in *Necchi* considered *Robert Lawrence Co. v. Devonshire Fabric, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959), which established the liberal federal policy toward arbitration, and which was relied upon by the Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 400 (1967). The *Prima Paint* decision did not disturb or contradict the holding in *Necchi*.

The Sixth Circuit's opinion in this case is in conflict with the earlier *Necchi* opinion of the Second Circuit. Here the contractual provision in question provides that "Any gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of the execution of this Agreement may be corrected by mutual consent." Like the situation the Second Circuit faced in *Necchi*, the gross inequity clause in this case presents a situation where "it is altogether too conjectural that the parties would have agreed and on what terms."

The Sixth Circuit distinguished *Necchi* as involving a dispute over a provision for renewal of a contract as opposed to a dispute over operations under an ongoing contract. (App. A7). The attempted distinction is unpersuasive and is more of an example of *ipse dixit* than a decision based on a previously recognized legal principle. In both *Necchi* and the instant case, the provision in question did no more than require the parties to examine the possibility of entering into a new agreement. Similar to the *Necchi* situation, in the absence of a new agreement by the parties on the adjustments necessary for alleged gross inequities, there is nothing to be enforced either by arbitration or judicial proceedings. The Court's statement that "the controversy must be settled somehow in the absence of mutual consent" (App. A8) flies in the face of the express words of the contract evidencing the intent of the parties. Mutual consent is required by the contract and forced submission to arbitration does not provide such consent.

Simply stated, the current dispute does not involve any agreement which the parties made in the contract,

so the current demand for a price increase does not arise under the agreement. If an arbitration award in the instant case granted Cimarron its requested price increase under §26.01, the contract price would be raised by as much as $340 million. Such a substantial rewriting of a material term is tantamount to rewriting the entire contract as bargained for by the parties. There is no reasonable distinction, for the purpose of requiring arbitration, whether the remainder of the contract is distorted beyond recognition or whether a renewal agreement is imposed on the parties. Both results constitute examples of the arbitrator writing the contract for the parties.

The Court below relies on two subsequent Second Circuit decisions as supportive of its interpretation of *Necchi*. *See Aeronaves de Mexico, S.A. v. Triangle Aviation Services, Inc.*, 515 F.2d 504 (2d Cir. 1975), *aff'g. by mem.*, 389 F. Supp. 1388 (S.D.N.Y. 1974); *American Home Assurance Co. v. American Fidelity & Casualty Co.*, 356 F.2d 690 (2d Cir. 1966). These two cases are clearly distinguishable from *Necchi* and the instant case and are not inconsistent with Petitioner's contention. Both cases involved clauses which mandated, rather than permitted, the parties to finally resolve certain described future events. In *American Home Assurance Co.*, the parties agreed that, "there *shall be* an adequate amendment" to a reinsurance agreement in the event that the final loss ratio on the contract during a specified period exceeds 65% of gross premium. In *Aeronaves*, the contract provided that "an increase in the charges *will be* negotiated," in the event certain described changes in the subject of the contract occurred during the term of the contract. In both cases the Second Circuit held such pro-

visions arbitrable, because they mandated a change in the contract price if an anticipated described commercial contingency occurred. *See Aeronaves, supra,* 389 F. Supp. at 1390. Also, in both of the latter Second Circuit cases, the subject of controversy concerned a commercial contingency previously contemplated by the parties, whereas in both *Necchi* and the instant case, the dispute between the parties concerned contingencies not previously contemplated by the parties.

Section 26.01 could not have been more explicit in expressing that at the time the contract was executed the parties did *not* contemplate what, if any, "gross proven inequity" would arise during the course of the agreement. Because such matters were unknown and not contemplated, the parties reasonably withheld a commitment to have such matters finally resolved. Section 26.01 does not provide that any "gross proven inequity" "shall be" or "will be" corrected. Instead it provides that such conditions, if any, "*may*" be corrected and that any such correction must be made "by the mutual consent" of the parties. The plain and ordinary meaning of that language is that the parties didn't know whether any such gross inequity would occur, or what would constitute a gross inequity, but that if such condition did occur, then it would be resolved by the mutual consent of the parties or not be resolved at all. Such a clause states an intent of the parties to consider the consequences of unforeseeable changes in the economy, but does not bind the parties to have a resolution to such changes arbitrated.[5]

5. When this agreement was entered into in 1969, Cimarron could reasonably have expected escalating costs of operating their mine, and Georgia Power could have anticipated regulatory restraints on its operating expenses from the Georgia Public Service Commission, but neither party could have reasonably contemplated the energy crisis and its effect on the coal market during the year 1974. Distortions of the market having unforeseeable consequences on the parties to the agreement were therefore reserved for consideration by the parties alone at the time they occurred.

The provision is no more arbitrable than was the provision in *Necchi* requiring the parties to "*examine the possibility* of executing a new . . . long term distributorship agreement . . . at such terms and conditions as will be then discussed and defined" (emphasis added).

Despite the clear and unambiguous language of §26.01, the Sixth Circuit ruled that Cimarron's claim for an adjustment in price was "a condition which was *recognized* by the parties as a possibility *when the contract was entered into.*" (App. A7). The Court then concluded that the claim to a price adjustment "*must be settled* somehow *in absence of mutual consent.*" (App. A8). Nothing in §26.01 can reasonably be construed to express or imply that Cimarron's claim was anticipated or that a resolution of that claim was mandated in the absence of mutual consent. The provision makes crystal clear that there is no duty on the part of either party to resolve the dispute or to submit it to an arbitrator for resolution. The second paragraph of §26.01 provides that nothing contained in that section shall relieve either party of its respective obligations under the contract, even if a claim of inequity exists and if the parties fail to reach an agreement with respect thereto.

The Federal Arbitration Act and its attendant national policy favoring arbitration do not, and cannot,

mandate an arbitrator to make an agreement for the parties, *Necchi*, *supra*, 348 F.2d at 698. As in other contracts, the express intent of the parties to reserve certain matters for mutual resolution in the future must be respected and not caught up in incantations of policy favoring arbitration. The Sixth Circuit's reasoning in the instant case signals the overreaction to an arbitration policy which must be tempered and refocused in order to prevent the destruction of the agreement between the parties in the instant case, and to prevent the rule of the Sixth Circuit from being adopted as a matter of law in subsequent cases.

II.

Section 26.01 of the Agreement Demonstrates an Intent to Exclude From Arbitration any Claims for Gross Inequities made Under that Provision.

The Sixth Circuit Court of Appeals ruled that Cimarron's unilateral claim made pursuant to §26.01 was arbitrable because of "the absence of language withdrawing this provision from the arbitration requirement." (App. A10). In support of that conclusion, the Court relied upon *American Radiator & Standard Sanitary Corp. v. Local No. 7, International Brotherhood of Operative Potters*, 358 F.2d 455, 458 (6th Cir. 1966), a collective bargaining agreement case, which held that "arbitration should not be denied unless it may be said with *positive assurance* that the clause does not cover the dispute" (emphasis added).

Petitioner maintains that the Court of Appeals erred in ruling that §26.01 did not state with "positive assurance" that claims made thereunder were excluded from the arbitration clause of the contract, because

the provision expressly reserves for the parties alone the authority to resolve any alleged claim of gross inequity by "mutual consent," or not at all. See Part I, *supra*. Petitioner further maintains, however, that the Court of Appeals applied the wrong standard of construction in this case, which has the effect of distorting the federal policy toward arbitration in commercial contracts.

The "positive assurance" rule of construction emanates from cases dealing with collective bargaining agreements, and has been tailored to effectuate the strong national policy which is peculiar to the labor relations field. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); Heiner, *Express Exclusions from Arbitration —Accommodating the Consensual with the Nonconsensual*," 1 GA. L. REV. 363, 364-368, 379-382 (1967). That rule is wholly inappropriate when applied to a commercial contract, such as the one in the instant case.

This Court has forcefully articulated that the objectives of a national labor policy are to be effectuated by using arbitration as "the substitute for industrial strike" and as "part and parcel of the collective bargaining process itself." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550-551 (1964), the Court characterized the peculiarities of arbitration clauses in labor agreements:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collec-

> tive bargaining agreement is not an ordinary contract. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant." *Warrior & Gulf*, *supra*, 363 U.S. at 578-579. Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, *see*, *id.*, 363 U.S. at 580, and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

Consequently, the duty to arbitrate in a labor agreement, while founded on contract, is construed "in the context of a national labor policy" with considerations favoring arbitration unique to the labor relations field. *Id.*

Contracts in a commercial context, on the other hand, possess none of the attributes of collective bargaining agreements, especially with regard to the peculiar role of an arbitration provision, nor are they governed by express statutory regulation, such as the National Labor Relations Act. "A commercial arbitration clause, unlike a labor arbitration provision, serves predominantly to implement the parties' intent." Note, *The Consequences of a Broad Arbitration Clause Under the Federal Arbitration Act*, 52 BOSTON U.L. REV. 571, 592 (1972). An arbitration clause contained in a commercial contract, therefore, should not be construed by the same principles which are tailored for the peculiarities of collective bargaining agreements.

Id. at 592, 594; *John Wiley & Sons*, *supra*, 376 U.S. at 550; Heiner, *supra*.

There is a federal policy favoring arbitration in lieu of litigation in commercial agreements subject to the Federal Arbitration Act, and commercial arbitration clauses should be construed as raising a presumption that disputes arising under the contract are arbitrable. Nevertheless, this presumption may be rebutted by contract language demonstrating an intent to exclude certain matters from arbitration, even if such intent is not "positive assurance" that the clause was to be excluded. *Cf.*, Heiner, *supra*, 1 GA. L. REV. at 382; *Strauss v. Silvercup Bakers, Inc.*, 363 F.2d 555, 558 (2d Cir. 1965); *El Hoss Engineering & Transport Co. v. American Independent Oil Co.*, 289 F.2d 346 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961).

In the instant contract the parties negotiated and bargained for the sale and purchase of coal, and included in that contract a standard arbitration clause,[6] intended to avoid litigation regarding general matters arising under the contract. They also included a pro-

6. Section 20.01 is very similar to the Standard Arbitration Clause recommended by the American Arbitration Association for general use in commercial contracts:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof." Commercial Arbitration Rules, Nov. 1, 1973.

Use of such standard clauses has been consistently increasing in commercial contracts. *See* Note, *supra*, 52 BOSTON U.L. REV. at 571-572.

vision, §26.01, which clearly demonstrates the intent of the parties to reserve the resolution of certain unforeseeable matters to the mutual agreement of the parties only. Section 26.01 provides that resolution of a gross inequities claim shall be by mutual consent of the parties or not at all. Therefore, a judicial determination of nonarbitrability of Cimarron's claim would not defeat the policy favoring arbitration in lieu of litigation in the commercial context. Failure of the parties to mutually consent to a correction of a claim under §26.01 cannot result in a justiciable issue, and, therefore, cannot be litigated. See Part I, *supra*.

This not being a collective bargaining agreement, there is no expertise in drafting arbitration clauses to cover all anticipated circumstances. *See John Wiley & Sons, supra*, 376 U.S. at 549-551. The question of intention of the parties is "to be ascertained by the same tests that are applied to contracts generally." *El Hoss Engineering & Transport Co., supra*, 289 F.2d at 350. Even with a policy favoring a presumption of arbitration, "there is no reason in fact or in law for frustration of this clearly demonstrated intent" not to arbitrate. *Id.* at 349. The rigorous standards of construction applicable to collective bargaining agreements are not appropriate for commercial agreements. *See* Note, *supra*, 52 BOSTON U.L. REV. at 594-596. The Court of Appeals, therefore, misapplied a "positive assurance" standard of construction to §26.01, and erroneously determined Cimarron's claim to be arbitrable.

The Court of Appeals also erroneously ruled that "in the absence of language withdrawing the provision from the arbitration requirement, it is a duty of

the court to resolve any *doubts* in favor of arbitration" (emphasis added). (App. A10). There was no evidence before the trial court as to the intent of the parties with regard to the arbitration clause, the gross inequities clause, or the contract in general. If the Sixth Circuit had a "doubt" as to the parties' intent, it should have remanded the case for further finding of fact on that issue, rather than resolving the "doubts" on the face of the contract. *See Strauss v. Silvercup Bakers, Inc., supra*, 353 F.2d at 558; Heiner, *supra*, 1 GA. L. REV. at 379-380.

CONCLUSION

Petitioner respectfully submits that the decisions of the courts below in this case are erroneous. By allowing for submission to arbitration of a nonjusticiable controversy, the Courts below have defeated the express intention of the parties at the time of contracting and have extended the types of matters referable to arbitration further than any court has previously done. This case thus provides the Court an opportunity to reexamine the law of commercial arbitration and provide desperately needed guidance in light of the increased use of commercial arbitration and changed economic conditions since the Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967).

Respectfully submitted,

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APPENDIX "A"

No. 75-1542
No. 75-1543

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGIA POWER COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

v.

CIMARRON COAL CORPORATION,
Defendant-Appellee,
Cross-Appellant.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed December 9, 1975

Before: PHILLIPS, Chief Judge; MILLER and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. The issue in this case is whether a dispute between the parties to a long-term fuel supply agreement is subject to arbitration. The coal supply agreement (Agreement) provided that for a period of ten years beginning January 1, 1970 Cimarron would "tender for delivery" and Georgia Power would purchase quantities of coal set out therein. The Agreement provided for a base price per ton of coal of $4.03 as of the date of the Agreement "subject to adjustment from time to time . . . ." Specific provisions of the Agreement dealt with the computation of adjustments in base price for changes in certain labor

costs, supplies and changes in "governmental impositions." Each such adjustment was to be computed according to a formula or method set forth in the Agreement. The Agreement also contained the following provision:

> 26.01. *Adjustments for Gross Inequities.* Any gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of the execution of this Agreement may be corrected by mutual consent. Each party shall in the case of a claim of gross inequity furnish the other with whatever documentary evidence may be necessary to assist in affecting a settlement.
>
> Nothing contained in this section shall be construed as relieving either the Purchaser or Seller from any of its respective obligations hereunder solely because of the existence of a claim of inequity or the failure of the parties to reach an agreement with respect thereto.

As the parties operated under the Agreement several increases in base price were made pursuant to the various provisions for adjustments, including the gross inequities provision of Section 26.01.

During 1973 and 1974 there was a rapid escalation in the market price of coal in the United States. Sometime prior to April 11, 1974 Cimarron requested an adjustment in the base price under Section 26.01 of the Agreement, claiming that a gross inequity had resulted from the disparity between the market price of coal and the price being paid under the Agreement. In responding to this request on April 11, Georgia

Power wrote: "As you are aware, we adamantly rejected and disagreed with your request for escalation based upon Section 26.01 of the Coal Supply Agreement. We did acknowledge, however, that a substantial disagreement existed over the interpretation of this provision." (P. Exhibit 38). On August 15, 1974 Cimarron requested an additional price adjustment under Section 26.01, pointing out that the current adjusted base price under the Agreement was $10.00 per ton while coal of the same quality was selling for $29.00 to $32.00 per ton on the open market. Because of "the very unusual economic conditions existing in the coal industry at this time . . .," Cimarron requested a change in base price to $16.50 per ton. (P. Exhibit 41). Georgia Power rejected the request, but offered to meet with Cimarron and discuss the matter. (P. Exhibit 42). During the succeeding months an adjustment in base price was agreed to by the parties primarily on the basis of increased costs of materials and supplies, bringing the base price when suit was filed to $10.41 per ton.

On November 1, 1974, Cimarron notified Georgia Power that it was increasing the base price for coal to $27.50 per ton effective November 5, 1974 and that "[w]e expect to suspend deliveries of coal to you on November 1, 1974, unless the basic price adjustment to become effective that day is agreed to or submitted to arbitration." (P. Exhibit 48). Georgia Power responded by telegram November 5, 1974, stating in part:

> In view of the above, if Cimarron ceases shipments on November 5, 1974, as threatened, we will have to immediately seek judicial enforcement

of the contract, and you should be governed accordingly. (P. Exhibit 50).

On November 7, 1974 Georgia Power filed its complaint in the United States District Court for the Western District of Kentucky where Cimarron is located. After reciting the material facts and setting forth its theory Georgia Power sought a temporary restraining order to prevent Cimarron from disposing of coal from the property subject to the Agreement to any purchaser other than Georgia Power until the commitments of the contract were fulfilled and from failing to produce and sell to Georgia Power the amounts of coal agreed to in the contract. In an amended and substituted complaint filed on November 13, 1974 Georgia Power also sought a declaratory judgment that Section 26.01 of the Agreement does not provide a means for increasing the price of coal without consent of Georgia Power and that Section 26.01 is not arbitrable, and a further declaration that Georgia Power had not breached the Agreement by its refusal to arbitrate the dispute.

The district court declined to enter a temporary restraining order, but obtained agreement of the parties to the entry of a status quo order by which Cimarron continued to ship to Georgia Power the quantities of coal provided for in the Agreement at the prices set therein until a decision on the merits. It further provided that if it should ultimately be determined that Cimarron was entitled to a price increase under Section 26.01, such increase would apply to coal shipped under the status quo order. Thereafter Cimarron filed an answer in which it contended that Georgia Power had breached the Agreement by refusing to submit an

unresolved controversy to arbitration and that by suing in the district court Georgia Power had waived its right to arbitration. Cimarron denied that it had breached the Agreement in any respect and stated affirmatively that the provision of the contract for arbitration contains no limitation on the subject matter of arbitration. Cimarron also filed a "cross-claim," which appears actually to be a counter-claim, in which it sought damages from Georgia Power for the coal shipped under the status quo order measured by the difference between the contract price and the prevailing market price for coal of equal quality at the time of delivery.

Following a hearing on the merits, the district court entered a judgment holding that the Agreement between the parties remained in full force and effect and directing that "the parties shall proceed without delay to arbitration of the defendant's claims asserted under Section 26.01 of said contract." The judgment also provided that the status quo order should remain in effect. District Judge James F. Gordon filed a memorandum opinion containing findings of fact and conclusions of law. Georgia Power appealed from that portion of the judgment directing arbitration and from rulings during the trial of the case in which the district court declined to admit evidence regarding the financial condition of the parties. Cimarron has cross-appealed from that portion of the judgment which denied it damages as claimed in its "cross-complaint"; from the holding that Cimarron had no right to rescind the contract upon Georgia Power's refusal to arbitrate and from the court's ruling that Georgia Power did not waive its right to seek judicial enforcement of arbitration or a declaratory judgment by reason of its

refusal to arbitrate. The appeal and cross-appeal were consolidated for hearing in this court.

Section 20.01 of the Agreement provides:

> 20.01. *Arbitration*. Any unresolved controversy between the parties, arising under this Agreement shall, at the request of either party, be submitted to arbitration under the rules of the American Arbitration Association. The cost and expense of any arbitration shall be shared equally by the parties, unless otherwise ordered by the arbitrator.

Georgia Power contends that Section 26.01 provides a purely permissive method of relieving a party from a gross inequity, but that its language is inconsistent with a requirement of binding arbitration. This position is based on the fact that Section 26.01 provides relief from gross inequities only "by mutual consent." It points to the fact that no criteria for gross inequity adjustments are contained in the Agreement, contrary to the provisions for adjustment on account of other changes in circumstances. Thus Georgia Power basically argues that a provision of an agreement which permits modification of any of its terms by mutual agreement of the parties may only lead to such modification if the parties do agree. To permit a dispute under such a provision to be settled by arbitration, it is argued, would permit the arbitrator to make a new contract for the parties.

Georgia Power relies principally upon the decision in *Necchi* v. *Necchi Sewing Machine Sales Corp.*, 348 F. 2d 693 (2d Cir. 1965), *cert. denied*, 383 U.S. 909

(1966). There the court held that a contractual provision that six months before the expiration of the agreement the parties "shall examine the possibility of executing a new and, it is hoped, long term distributorship agreement for the same territory and at such terms and conditions as will be then discussed and defined" was not arbitrable. *Id.* at 698. The court found that there was no obligation upon Necchi to renew the distributorship and no provision for relief if it failed to examine the possibility of renewal. Speaking through Judge (now Justice) Marshall the court said, "Certainly, we cannot ask that a renewal contract be written for the parties, as it is altogether too conjectural that the parties would have agreed and on what terms." *Id.* This conclusion was reached even though the agreement contained a broad provision for arbitration of "[a]ll matters, disputes or disagreements arising out of or in connection with this Agreement . . . ." *Id.* at 695.

The present case is quite different from *Necchi*. There the parties sought to enforce a provision for renewal which did no more than require the parties to examine the possibility of entering into a new agreement. The dispute did not concern operations under the agreement and the language of the renewal provision presented nothing for the arbitrator, or a court, to enforce. On the other hand, in the case now under review a dispute arose during the life of a subsisting contract with respect to a present adjustment in prices on the basis of a condition which was recognized by the parties as a possibility when the contract was entered into. There is a difference between a provision which requires parties to attempt to agree on a new contract and one which requires them to attempt to

make an adjustment in price under an ongoing contract by mutual consent. Under the former situation in the absence of a new agreement there is no contract to enforce either by arbitration or judicial proceedings. In the latter case the parties remain bound to continued operations under their contract and the controversy over a claimed right to price adjustment must be settled somehow in the absence of mutual consent. In such a case if the contract provides for arbitration, the arbitrator is only required to resolve a controversy arising under the agreement of the parties, not write a new agreement for them.

The mere fact that it provided for correction of gross inequities by mutual consent did not remove Section 26.01 from arbitrability. The *Necchi* court has so held in cases where the fashioning of a renewal was not involved. In *American Home Assurance Co.* v. *American Fidelity & Casualty Co.*, 356 F.2d 690 (2d Cir. 1966), a contractual provision for a reduction of reinsurance premiums "on a basis to be mutually arranged" was held to be arbitrable. In *Aeronaves de Mexico S.A.* v. *Triangle Aviation Services, Inc.*, 389 F. Supp. 1388 (S.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975), a dispute under a provision that increases in charges for servicing airplanes "will be negotiated to the satisfaction of both parties" was held to be arbitrable. Georgia Power's reliance on *Beech Aircraft Corp.* v. *Ross*, 155 F. 2d 615 (10th Cir. 1946), is misplaced. The contract under consideration in that case contained no arbitration provision. Under those circumstances the court held that a provision for price changes to be effected "by mutual agreement," in the absence of a formula for final revision of prices, did not provide an acceptable standard by which a court

could give effect to the intention of the parties. The reasoning of the court in the *Beech Aircraft* decision does not compel the same result in a case where the parties have agreed in advance to submit unresolved controversies to arbitration.

In their briefs both parties have recognized that there is a strong federal policy in favor of arbitration. This is true in the realm of commercial transactions as well as labor relations. Nevertheless, as this court has held, ". . . arbitration is a matter of contract between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration." *United Steelworkers, Local No. 1617* v. *General Fireproofing Co.*, 464 F.2d 726, 729 (6th Cir. 1972). The language of the arbitration clause in the Agreement before us is as broad and general as one can conceive. Though Section 26.01 makes no direct reference to arbitration, whereas several other provisions of the contract do refer to the requirement of arbitration, nevertheless we conclude that if the parties had not intended for controversies arising under Section 26.01 to be submitted to arbitration the Agreement would have so provided. The intention of the parties must be determined from the entire agreement. This court has stated that ". . . arbitration should not be denied unless it may be said with positive assurance that the clause does not cover the dispute." *American Radiator & Standard Sanitary Corp.* v. *Local 7, International Brotherhood of Operative Potters, AFL-CIO*, 358 F.2d 455, 458 (6th Cir. 1966). While some of the provisions of the contract make reference to the arbitration requirement, there is no indication or statement that any provision of the contract is wholly outside of the arbitration provision. The gross inequities provi-

sion deals with a possible adjustment in price which might be required because of unforeseeable changes in the economic climate of the coal industry. This provision lacks the specific details of the other portions of the Agreement dealing with price adjustment, but that arises from the fact that it is something of a "catch-all" provision designed to take care of the kinds of changes which cannot be predicted in detail, but which experience teaches do occur. In the absence of language withdrawing this provision from the arbitration requirement it is the duty of the court to resolve any doubts in favor of arbitration. *American Radiator* v. *Local 7*, *supra* at 458.

When the parties to a contract foresee the possibility of a change in circumstances which might require modification of the contractual terms and provide for modification by mutual consent, and thereafter are unable to agree upon such modification, the resulting dispute is subject to a broad arbitration provision such as that contained in the Agreement now before the court. The fact that contracting parties agree in general terms to arbitration of disputes indicates a determination that their interests will be better served by arbitration than by resort to the courts if problems arise. The nature of a dispute which thereafter actually occurs is immaterial. As Judge Learned Hand wrote in *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 70 F.2d 297, 299 (2d Cir. 1934); *aff'd.*, 293 U.S. 449 (1935): "If the clause is general in form, it makes no difference what may come up under it."

Georgia power also argues that the Supreme Court recognized a federal policy in favor of stabilization of the fuel costs of public utilities in *Tampa Electric Co.*

v. *Nashville Coal Co.*, 365 U.S. 320 (1961), and that policy would be violated by permitting arbitration of a claim for a price increase based on an asserted gross inequity. The short answer to this contention is that the *Tampa Electric* case was not concerned with arbitration or with the application of the gross inequities provision in the coal contract between Tampa Electric and Nashville Coal. *Tampa Electric* was an antitrust case, and the issues before the Court were entirely different from those under consideration in the present case.

The second issue raised by Georgia Power relates to the refusal of the district court to receive evidence tendered by Georgia Power relating to the financial condition of Cimarron. It is the theory of Georgia Power that it was entitled to show that Cimarron had not suffered economic hardship by reason of increases in the market price of coal and that Cimarron had actually improved its financial condition as a result of the Georgia Power contract. Georgia Power also offered evidence designed to show that it was in a severe financial crisis which would be worsened if Cimarron should be allowed to raise the price of its coal above that provided in the contract. Basically, Georgia Power argues that it was an abuse of equitable discretion for the district court to refuse to receive this evidence. The district court properly declined to consider such evidence. The first question before the district court on Georgia Power's complaint after denying the request for a temporary restraining order was whether the unresolved controversy between the parties under Section 26.01 was arbitrable. It was not the duty of the court to decide whether a gross in-

equity did in fact exist as claimed by Cimarron. The rejected evidence appears to relate to that issue rather than the question of arbitrability.

We find no merit to Georgia Power's arguments based on the provision of the Agreement that it should be construed according to Georgia law. In the present case the district court found that the transaction between Georgia Power and Cimarron is one involving commerce within the meaning of the Federal Arbitration Act and this finding is not questioned on appeal. In *West Point-Pepperell, Inc.* v. *Multi-Line Industries, Inc.*, 201 S.E. 2d 452, 453 (Ga. 1973), it was held that "the state law and policy with respect thereto [arbitration] must yield to the paramount federal law."

Cimarron contended in the district court and continues to argue on appeal that Georgia Power breached the Agreement by refusing to arbitrate Cimarron's demand for a price increase under Section 26.01 and as a result Cimarron was entitled to rescind the contract in its entirety. On this theory Cimarron filed its "cross-claim" asking damages in an amount equal to the difference between the contract price at which it has continued to deliver coal under the status quo order and the market price. The district court held that Georgia Power did not breach the Agreement by declining arbitration and filing this action for a judicial determination of arbitrability of the controversy, and that Cimarron had no right to rescind. The record discloses that Georgia Power suggested to Cimarron that it file suit for an order compelling arbitration under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4. Cimarron did not follow this course

of action, nor did it notify the American Arbitration Association of the existence of the controversy. After Cimarron declined to seek judicial enforcement of the arbitration provision under Section 4 and unilaterally declared the contract rescinded, Georgia Power filed this suit seeking, among other things, a declaratory judgment as to the arbitrability of a controversy under Section 26.01 of the Agreement. Georgia Power continued to insist on performance of the contract by Cimarron and submitted the issue of arbitrability to the district court. A party does not act at its peril in seeking an initial judicial determination of whether an arbitration clause applies to a particular dispute arising under an agreement. *General Guaranty Insurance Co.* v. *New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970). To hold that one who seeks such a judicial determination has breached the entire agreement out of which the controversy arose would tend to make parties reluctant to agree to arbitration and would run counter to the policy in favor thereof. In *Galt* v. *Libbey-Owens-Ford Glass Co.*, 376 F.2d 711 (7th Cir. 1967), relied upon by Cimarron, a party was held to have repudiated its agreement to arbitrate, giving the other party an election to forego arbitration or insist upon it. Georgia Power did not repudiate the Agreement by bringing this action, and Cimarron had no right to rescind.

The judgment of the district court is affirmed on appeal and cross-appeal. No costs allowed.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT OWENSBORO

GEORGIA POWER COMPANY, *Plaintiff,* v. CIMARRON COAL CORPORATION, *Defendant,*	Civil Action No. C-74-107-0

MEMORANDUM OPINION . . . . OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial and judgment on January 9, 1975, upon the whole record herein.

The amount in controversy exceeds $10,000.00, exclusive of interest and costs, and, further, the Court has jurisdiction of this action, Title IX, U.S.C. Section 2, et seq.

The plaintiff is a Georgia corporation engaged in the business of generating, distributing and selling electric power, and the defendant is a Tennessee corporation with its principal place of business in Madisonville, Kentucky, and is engaged in the mining of coal by the strip or open pit method of mining.

On or about February 6, 1969, these parties entered into a long-term coal supply agreement drafted by the plaintiff. Suffice it to say, said agreement con-

tained various provisions for the allowance of price adjustments during the life of the contract resulting from increases to the defendant in its labor, material, supply and other types of costs. From time to time, under the provisions pertinent to the above costs the contract has been adjusted price-wise per ton of coal and resulting amendments to the base supply agreement to embrace said adjustments have been made.

The basic coal supply agreement contains an arbitration clause denominated 20.01, reading as follows:

> "*Any unresolved controversy* between the parties, *arising under this agreement* shall, at the request of either party, be submitted to arbitration under the rules of the American Arbitration Association. The cost and expense of any arbitration shall be shared equally by the parties, unless otherwise ordered by the arbitrator." (Emphasis ours.)

The coal supply agreement further contains a clause denominated as 26.01, reading as follows:

> "Any gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of the execution of this agreement may be corrected by mutual consent. Each party shall in the case of a claim of gross inequity furnish the other with whatever documentary evidence may be necessary to assist in affecting a settlement.
>
> "Nothing contained in this section shall be construed as relieving either the purchaser or the seller from any of its respective obligations here-

under solely because of the existence of a claim of inequity or the failure of the parties to reach an agreement with respect thereto."

Beginning in early Spring of 1974, Cimarron made a request for an adjustment in price under paragraph 26.01. Meetings were held, the request was refused by Georgia, whereupon Cimarron demanded arbitration which was refused by Georgia, whereupon Cimarron gave notice and ceased delivery under the supply agreement, whereupon the plaintiff sued.

There is no real dispute about the facts, and the issue before us is whether or not section 26.01 of the supply agreement, as amended, is arbitrable under the contract when the parties are unable to agree upon relief thereunder.

Air Lines v. Louisville Air Board, 269 F.2d 811 stands for the proposition that state prohibitions against arbitration have been preempted by federal legislation and that therefore, absent some state law deficiency as to the validity of the agreement itself, such as fraud, et cetera, arbitration provisions will be held valid. There is no contractual defect here under Georgia law.

It appears to us from a perusal of the federal cases appearing in the annotations to Title 9, Section 2, Arbitration — such cases as *Butler v. Unistrut*, 367 F.2d, 733 (note 5-7), — that federal courts now look with favor upon arbitration as a means of removing contentions from the area of litigation, relieving congested dockets and as a means of speedy and inexpensive relief.

No one quarrels, least of all we, that for a dispute to be arbitrable there must have been a contractual agreement to arbitrate; however, the modern tendency seems to be that on the issue of what was agreed to be arbitrated, if "fairly debatable" or "reasonably in doubt", then such should go to arbitration. *Butler*, supra. Likewise, no one quarrels with the proposition, as expressed in the law of Georgia cited by the plaintiff, and also in the *Necchi v. Necchi Sewing*, 348 F.2d 693, a contract to make a contract is not enforceable, but such is not the case here.

Further, no one seems to disagree with the general proposition of the law that though the Court may not make a new contract for parties, or rewrite the agreement under the guise of construction, the Court must look to the instrument as a whole and, if it is not ambiguous or uncertain, give it enforcement according to the terms used by the parties in the language they saw fit to employ. *Evans v. Kelley*, 214 F. Supp. 951.

In the instant matter, we are handed a contract. It contains an arbitration clause expressing in substance that *any* unresolved controversy arising *under* the agreement is subject to arbitration. It does not except any provisions of the contract from its operation. Further, included as a part of that contract is the clause denominated 26.01.

Along with this document, we are given the factual background that from time to time during the history of this agreement price adjustments have been given to Cimarron, partially at least, under paragraph 26.01, when Georgia Power felt that the adjustment requested was "cost related", or otherwise beneficial to it.

The plaintiff, it seems, would have us read and interpret the arbitrability of 26.01 removed the contract or in a legal vacuum, so to speak, arguing that such a reading shows that 26.01 would stand only for the proposition that "hope" is the only "mother" of any thought of relief sought thereunder. We recognize that read in a vacuum, and not with the contract as a whole, 26.01 would mean nothing as far as arbitrability is concerned as the avenue for denial of relief thereunder, but we must decline plaintiff's invitation to construe it in that narrow light. We see nothing in the contract that directs us to follow that course of interpretation.

There is no magic to price adjustments in this long-term coal contract and certain types of adjustments have been provided under this contract. There is no claim or argument advanced by plaintiff that the price adjustments initially provided for, or subsequently provided for by amendments under 3.02, 3.03 and 3.04, would not have been subject to arbitration had the parties been unable to mutually agree thereon; so it seems to us that the fact of an adjustment under the gross inequity clause 26.01 not being arbitrable, as plaintiff would argue claiming such to be a rewriting of the agreement, does not hold water — particularly where this agreement was drafted by the plaintiff, who, if it was not the intent of the parties that 26.01 be subject to arbitration, could have simply provided that 26.01 was not arbitrable. There is no provision to that effect.

Thus, we hold that 26.01 is arbitrable and with the Court's general equitable power a judgment will be entered without delay directing arbitration of the

unresolved dispute under 26.01. We express no opinion as to the merits of Cimarron's claim of gross inequity.

(2) We do not find the plaintiff in breach for failure to arbitrate, for such would be an abuse of equity and a negation of its historical justness by a technical overriding by harsh legal doctrine, particularly in view of the public interest inherent in this proceeding.

(3) As to Cimarron's claim of breach by plaintiff for refusal to arbitrate, we hold against Cimarron under the equitable principles of (2) aforesaid, and the further recognition of the fact that arbitrability here as to 26.01 is a matter about which reasonable men, in good faith, could differ, and I believe the plaintiff had the right to satisfy itself by a judicial determination.

(4) As to Cimarron's claim that arbitration was a condition precedent to legal remedy and that the plaintiff by seeking such has elected a remedy and that the plaintiff by seeking such has elected a remedy and waived arbitration, we hold against Cimarron under equity principles and by our direction of arbitration of this matter aforesaid.

(5) Plaintiff's seeking of the declaratory judgment as to arbitrability does not give Cimarron the unilateral right to terminate.

(6) As to the affirmative defenses of plaintiff raised in the answer to the counterclaim, we find that adequate notice by Cimarron for arbitration was sufficiently given and that Cimarron did not waive its right to arbitrate by the contractual amendments it was bound to and did execute after the arising of this controversy.

The Court will retain this matter upon its docket and a judgment will be forthwith entered directing arbitration, there being no cause for delay, and the status quo order of this Court heretofore entered by agreement, without prejudice to the rights of the parties, remains in full force and effect, pending the outcome of the arbitration herein ordered, or, if objection is raised to said status quo order upon appeal, until it is dissolved by an appellate judge of the Sixth Circuit.

February 10, 1975

JAMES F. GORDON
United States District Judge

Copies to:
Counsel of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT OWENSBORO

GEORGIA POWER COMPANY, *Plaintiff,* v. CIMARRON COAL CORPORATION, *Defendant,*	Civil Action No. C-74-107-0

JUDGMENT

This matter having come on for trial and upon the whole case the Court does adjudge as follows:

1. IT IS ORDERED AND ADJUDGED that the contract between the parties which is the subject matter of this litigation is in full force and effect and binding upon each of the said parties, plaintiff and defendant.

2. IT IS FURTHER ORDERED AND ADJUDGED that the parties shall proceed without delay to arbitration of the defendant's claims asserted under Section 26.01 of said contract.

3. IT IS FURTHER ORDERED AND ADJUDGED that the status quo order, without prejudice to the rights of the parties, heretofore entered herein providing for delivery of coal under the contract shall remain in full force and effect.

4. IT IS FURTHER ORDERED AND ADJUDGED that each party shall bear its own costs.
January 15, 1975

JAMES F. GORDON
United States District Judge

Copies to: Counsel of record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

GEORGIA POWER COMPANY, *Plaintiff* vs. CIMARRON COAL CORPORATION, *Defendant*	CIVIL ACTION NO. 74-107

ORDER

This matter came on for hearing on November 21, 1974, and there were present Hon. Martin Roach, Hon. Michael C. Murphy, Hon. J. Kirk Quillian and Hon. Allen E. Lockerman on behalf of the plaintiff, and Hon. W. Stuart McCloy, Sr. on behalf of the defendant.

The Court ORDERS the defendant Cimarron to deliver under the contract the contract quantities of coal at their last agreed contract shipping price per ton until a decision of this matter on the merits.

Provided: That, if after a hearing on the merits, this Court finds the dispute under 26.01 to be arbitratable and such determination is supported on appeal, and

Provided further, that the arbitrator, acting pursuant thereto, should subsequently award the defendant Cimarron relief under 26.01 in its per ton price, then such award, so given, would be instituted

retroactively by the plaintiff, so as to include all tons of coal shipped pursuant to this order.

It being understood, of course, that should this Court after hearing on the merits determine 26.01 not arbitratable and such position be upheld on appeal; or having determined the same to be arbitratable the defendant Cimarron fails to win the arbitration, then in such event no additional sum would be owed the defendant Cimarron for the coal shipped pursuant to this order.

November 21, 1974

JAMES F. GORDON
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of record

APPENDIX "B"

COAL SUPPLY AGREEMENT

THIS AGREEMENT is made and entered into on the 6th day of February, 1969, by and between GEORGIA POWER COMPANY, a corporation organized and existing under the laws of the State of Georgia, and having its principal office in the City of Atlanta, Georgia ("Purchaser"), and CIMARRON COAL CORPORATION, a corporation organized and existing under the laws of the State of Tennessee, and having its chief principal office in the City of Madisonville, Kentucky ("Seller").

Purchaser represents and warrants that it owns and operates power generating stations which require large quantities of coal to operate.

Seller represents and warrants that it controls through the instruments identified on Exhibit attached hereto and made a part hereof certain acreages in Hopkins County, Kentucky ("the Cimarron property"), outlined in red on a map which is attached hereto as Exhibit 2 and made a part hereof, which contain more than 20 million tons of coal that can be commercially mined or recovered by strip, auger or deep mining methods. Seller further represents and warrants that it will build prior to the commencement date of this Agreement fast loading facilities capable of loading unit trains at the rate of 3,000 tons per hour.

NOW THEREFORE, Purchaser and Seller agree as follows:

1.01. *Mutual Obligations.* Seller agrees to sell

coal to Purchaser, and Purchaser agrees to buy coal from Seller on the terms and conditions and in the quantities set forth below:

2.01. *Term of Agreement.* The term of this Agreement shall be ten (10) years commencing January 1, 1970. After the expiration of the ten (10) year primary period of this Agreement, Purchaser shall have successive options to renew this Agreement for three periods of five (5) years each. The right to exercise these options is conditioned upon negotiation of a mutually agreeable base price and upon Seller having sufficient available coal reserves to dedicate for each option period. Such options shall be exercised by giving Seller two years' written notice prior to termination of the primary period or of the option period then in effect. Upon receipt by Seller of such notice, Purchaser and Seller shall proceed in good faith for sixty (60) days to attempt to negotiate a mutually agreeable base mine price for the option period involved. If a mutually agreeable base mine price is negotiated, then Seller shall promptly proceed to dedicate sufficient reserves to fulfill its commitment; otherwise the contract shall terminate and Purchaser shall not have any further rights hereunder.

3.01. *Base Price Per Ton of Coal.* The Base Price per ton of coal as of the date hereof is $4.03 f.o.b. railroad cars at the Cimarron unit train loading facilities. Base Price is subject to adjustment from time to time, and hereafter "Base Price" shall mean Base Price as adjusted. "Ton" shall mean a ton of two thousand (2,000) pounds avoirdupois weight.

3.02. *Base Price Adjustment.* The Base Price per

ton of $4.03 provided for in Section 3.01 is predicted in part upon the strip mine wage scale rates, fringe benefits, welfare payment rates, and working conditions for labor employed in producing, washing and loading coal prevailing on January 1, 1969 in Hopkins County, Kentucky, and in part, upon the January 1, 1969 rates and amounts of all taxes and other burdens (including, but not limited to, coal land reclamation costs, but not including sales and use taxes paid by Purchaser under Section 16.01 and income taxes or taxes based upon income) imposed by any federal or state statute, regulation or local ordinance on the ownership, production or sale of coal under this Agreement (hereinafter collectively referred to as "government imposition") in force and effect on January 1, 1969.

The amounts and rates of said labor costs and said governmental impositions in effect on January 1, 1969 are set forth in Exhibit 3 attached hereto and made a part hereof.

3.03. *Computation of Adjustment for Changes in Certain Labor Costs.*

(a) In the event and whenever after January 1, 1969 the strip mine wage scale rates for producing, washing or loading coal sold hereunder shall increase or decrease over or under the arithmetic average wage scale of $4.247 (14 wage classifications ranging in rate from $4.765 to $3.865 giving an arithmetic average of $4.247, hereinafter referred to as "base average wage scale rate"), as set forth in item 1 of Exhibit 3, pursuant to any collective bargaining agreement lawfully entered into by Seller, or pursuant to changes in strip mine wage scale rates for producing, washing or load-

ing coal which are incurred by Seller at its mines on the Cimarron property as the result of a change in national or regional bituminous coal union wage agreements, then during the period any such increase or decrease is in effect, the Base Price shall be increased or decreased effective immediately as follows:

Effective with the date of any change in strip mine wage scale rates referred to in this Section 3.03, a new arithmetic average wage scale rate (hereinafter referred to as "new average wage scale rate") shall be determined by the following formula:

$$\text{New Average Wage Scale Rate} = \frac{\text{Total of Seller's Wage Scale Rates for all Production Employees on the Cimarron Property}}{\text{Number of Seller's Wage Classifications of Production Employees on the Cimarron Property}}$$

The new average wage scale rate will be compared with the base wage scale rate and the percentage increase or decrease computed. The Base Price shall then be increased or decreased by an amount determined by multiplying the percentage increase or decrease times $0.75, such $0.75 being the total cost of labor per ton in effect January 1, 1969 on the Cimarron property.

A detailed example of how the above escalation plan is intended to operate is shown in Exhibit 5 which is attached hereto and made a part hereof.

(b) If after execution of this Agreement it should become necessary for Seller to enter into a collective

bargaining agreement with any union, Purchaser shall pay one-third (1/3) of the then existing union welfare fund payment made by Seller during the term of this Agreement. Purchaser's responsibility hereunder shall not include the satisfaction of any part of Seller's liability for any previously unfunded welfare fund created by virtue of entering into such a collective bargaining agreement.

3.04. *Adjustment for Changes in Governmental Impositions.* In the event and whenever after January 1, 1969 any federal or state statute, regulation or local ordinance or amendment thereto imposes or removes, increases or decreases any governmental impositions set forth in items 4, 5, 7, 8 and 9 of Exhibit 3, then during the period when such imposition, removal, increase or decrease is in effect, the Base Price shall be increased or decreased, as the case may be, by the amount of such imposition, removal, increase or decrease applicable to the coal sold to Purchaser hereunder.

Purchaser and Seller shall jointly estimate the amount of any with the terms of the applicable tariff as amended, supplemented or replaced. Anything in this Agreement to the contrary notwithstanding, if the applicable tariff, or such tariff as amended, supplemented or replaced, imposes more onerous car loading terms, conditions or duties on Seller than those represented by Seller in this Agreement or than those existing in the applicable tariff on January 1, 1970, Purchaser shall pay Seller the cost of performing such more onerous terms, conditions or duties within thirty (30) days after receipt from Seller of a written state-

ment itemizing such charges and showing facts necessary to permit Purchaser to verify such charges.

Purchaser and Seller mutually agree that this Agreement is based on a coal tariff being published by, or at the direction of, the Louisville and Nashville Railroad Company which will provide acceptable unit train rates, and which will permit the delivered cost of Seller's coal to Purchaser to be competitive with other sources of coal, similarly situated, from which Purchaser receives coal under long term contract. The S.F.T.B. Freight Tariff 914-B, I.C.C. S-130 (Jacmac, Georgia) as amended is not to be construed by Purchaser or Seller as being the tariff referred to by this paragraph.

5.02. *Freight Charge and Risk of Loss.* Subject to reimbursement provided by Sections 5.03 and 5.04, Purchaser shall pay all freight and other charges imposed by the tariff applicable to the destination of the shipment and shall bear the risk of loss of said shipment after each shipment has been loaded on cars provided by carrier.

5.03. *Excess Loading Costs Chargeable to Seller.* If Seller fails to satisfy the loading requirements of the applicable tariff, as specified by Purchaser if more than one origin loading time is available, and such failure is not due to a Section 14.01 force majeure, Seller shall pay Purchaser any resulting car detention penalties or charges for cars not loaded to marked capacity which Purchaser is required by such tariff to pay carrier.

5.04. *Excess Freight Costs Chargeable to Seller.*

If Seller fails to tender sufficient coal to satisfy the quantity requirements of Section 7.01 and thereby fails to satisfy the tonnage requirements of the applicable tariff and such failure is not due to a Section 14.01 force majeure, Seller shall pay Purchaser any resulting freight charges which Purchaser is required by such tariff to pay carrier over the amount of such charges otherwise payable; provided, however, that if under applicable governmental regulations it is lawful for Purchaser, in lieu of payment of such excess freight charges required by the applicable tariff, to pay the freight charges, at the tariff rate, on the amount of coal which Seller, under Section 7.01 was obligated to, but did not, ship for the time period in question, and if such freight charges on such unshipped coal are less than the above described excess freight charges, and if the carrier is willing to accept such freight charges on such unshipped coal in full settlement of Purchaser's liability under the applicable tariff for the time period in question, then Seller shall be obligated hereunder only to pay to Purchaser the amount of such freight charges on such unshipped coal; provided further, however, that where the tonnage requirements of the applicable tariff are to be met in part by Seller and in part by a supplier or suppliers other than Seller, Seller shall have no responsibility to Purchaser for any freight charges where such other supplier or suppliers and not Seller fail to satisfy the quantity requirements required of such supplier or suppliers, and Seller's responsibility to Purchaser shall be limited to the payment of such excess freight charges required by such tariff on the coal shipped by Seller under this Agreement where both Seller and such other supplier or suppliers fail to satisfy the quantity requirements required of them.

5.05. *Payment of Excess Costs to Purchaser.* Any payments required by Sections 5.03 and 5.04 above shall be promptly paid on receipt by Seller of a written statement from Purchaser itemizing such charges. At Seller's election such charges may be credited against amounts owed by Purchaser to Seller hereunder.

6.01. *Shipping Notice.* Promptly after loading each shipment Seller shall mail Purchaser a notice of shipment which shall include pertinent information about such shipment as mutually agreed to by Purchaser and Seller from time to time.

7.01. *Quantity Requirements.* Seller will tender for delivery, and Purchaser will buy the following quantities of coal:

(a) 1,400,000 tons during the first twelve (12) month period of the term hereof;

(b) 1,400,000 tons during the second twelve (12) month period of the term hereof; and

(c) 2,100,000 tons during each of the remaining eight (8) twelve (12) month periods of the term hereof.

8.01. *Weighing.* The weight of coal sold and delivered hereunder shall be determined from Seller's scales, which scales shall be acceptable to Purchaser and the Louisville and Nashville Railroad and which shall be certified by Southern Weighing and Inspection Bureau. In the absence of scale weights from Seller, the Purchaser and Seller will mutually determine by what means the weight of coal sold, delivered and purchased hereunder shall be determined.

The aggregate weights determined during any payment period shall be accepted as the quantity of coal sold and purchased during such period for which invoices are to be rendered and payments to be made.

9.01. *Quality Specifications.* All coal sold hereunder shall conform to the following specifications:

(a) *Content and Characteristicss*

(All percentages shown below are percentages by weight.)

	As Received
Ash	9.9%
Fixed Carbon	36.7%
Moisture	8.0%
Volatile Matter	45.4%
	100.0%
Sulphur	3.0%
Calorific Value	12,000 Btu/pound
Ash Fusion Temperature— Softening (H=W) (ASTM Designation: D 1857-66 T)	2175 Degrees Fahrenheit
Grindability Hardgrove— (ASTM Designation D 409-51 (1961))	56

(b) *Size and Condition.* Crushed and washed run of mine three inch (3") maximum size lumps; no intermediate sizes removed; clean and free of excess impurities.

10.01. *Sampling and Analyses.* Seller shall collect samples of each shipment of coal sold hereunder in accordance with procedures and methods acceptable to Purchaser and which meet basic American Society of

Testing Materials (A.S.T.M.) standards, and Purchaser shall analyze such samples in accordance with the procedures outlined in Exhibit 4 which is attached hereto and made a part hereof except as hereinafter provided. Purchaser shall have the right at its option, however, to contract with an independent, qualified, commercial testing laboratory to perform, using the procedures outlined in Exhibit 4, the analysis of the samples referred to above and to perform or supervise the sample preparation at Seller's mine. If Purchaser so elects to employ an independent, qualified, commercial testing laboratory, Seller shall not be liable for any costs incurred by Purchaser in use of such laboratory except as hereinafter provided.

Purchaser may observe any samplings performed by Seller and Seller may observe any analyses performed by Purchaser or its designated commercial laboratory.

All samples collected by Seller shall be divided into at least two parts and put in suitable airtight containers, the first container in each case to be forwarded to Purchaser, or its designated commercial laboratory, the second container in each case to be held available by Seller for a period of thirty (30) days from actual date of receipt of coal, by Purchaser properly sealed and labeled, to be analyzed if a dispute arises between Purchaser and Seller.

If a dispute arises between Purchaser and Seller over the result or method of such analyses, a further analysis of Seller's second container shall be made using the analytical procedures outlined in Exhibit 4 by an independent, qualified, commercial testing facili-

ty, and the results of such further analyses shall be binding upon the parties. The selection of such testing facility shall be agreed upon by the parties; otherwise, such selection shall be made by arbitration as provided in Section 20.01 below. The cost of any independent analysis shall be borne equally by Seller and Purchaser.

If any dispute arises concerning the method of sampling used and such dispute is not promptly resolved by the parties, such dispute shall be referred to arbitration as provided in Section 20.01 below.

11.01. *Performance Under Contract.* If the averages of the results of the analyses made in accordance with Section 10.01 during any calendar quarter reveal that the average percentages of the components of the coal delivered during that quarter exceed 12% for ash, 9.5% for moisture, or 3.3% sulphur, or if the average as received calorific value of such coal for such period shall be less than 11,500 Btu per pound, Purchaser may advise Seller of such variations; and, unless the variations are corrected during the next calendar quarter, Purchaser may suspend deliveries until Seller gives reasonable assurances that it will thereafter eliminate such variations. In the event deliveries should be so suspended as above provided, Seller shall pay Purchaser any excess freight charges under the applicable tariff resulting from a failure to meet the quantity specifications in Section 7.01 hereof.

12.01. *Quarterly Premium or Penalty for Variance in Average As Received Calorific Content.* Purchaser shall pay Seller a premium whenever the average as received calorific value of coal delivered during any calendar quarter exceeds twelve thousand (12,000)

Btu per pound. Seller shall pay Purchaser a penalty whenever the average as received calorific value of coal delivered during any calendar quarter is less than twelve thousand (12,000) Btu per pound.

The amount of such premium or penalty per ton of coal shipped during any calendar quarter hereunder shall be computed after the end of each calendar quarter of the term of this Agreement and shall equal the difference between the Base Price of coal delivered during such calendar quarter and the Base Price of such coal multiplied by a fraction, the denominator of which shall be twelve thousand (12,000) and the numerator of which shall be the average as received calorific value of the coal delivered during such calendar quarter expressed in Btu. The average as received calorific value as used in this Section 12.01 shall be that abstracted from analyses determined as provided in Section 10.01 above.

Purchaser shall give Seller written notice of the amount of such premium or penalty as soon as all analyses of coal shipped during such calendar quarter have been completed, but no later than ninety (90) days after the end of such calendar quarter. Unless Seller protests the premium or penalty within fifteen (15) days after receipt of such notice, the premium or penalty shall be deemed accepted.

If the premium or penalty is not so protested, Purchaser shall pay such premium, or Seller shall pay such penalty, on or before the next succeeding payment day provided by Section 4.01.

If the premium or penalty is so protested within

such fifteen (15) day period and the parties are unable to resolve their dispute within thirty (30) days following such protest, the parties shall promptly refer the controversy to arbitration as provided in Section 20.01 below.

13.01. *Additional Coal Production.* Seller contemplates mining from the Cimarron property and selling other coal over and beyond the requirements of this contract. With respect to the sale of coal from this property by contract providing for performance within 365 days or less ("spot coal"), Seller shall offer in writing to sell such spot coal to Purchaser before offering to sell such spot coal to anyone other than Purchaser, and Purchaser shall have seventy-two (72) hours after the receipt of such offer to accept such offer. If such offer is not accepted, Seller shall be free to offer such spot coal to anyone. With respect to sale of other than spot coal ("additional coal"), Seller shall offer in writing to sell such additional coal to Purchaser before offering to sell such additional coal to anyone other than Purchaser, and shall promptly thereafter undertake in good faith to negotiate terms and conditions with Purchaser. If Seller and Purchaser do not execute a letter of intent to sell and purchase such additional coal within thirty (30) days after Purchaser receives such notice, Seller shall be free to offer and to sell such additional coal to anyone. Purchaser shall have no right to spot coal or additional coal or to prevent Seller from selling spot coal or additional coal to anyone other than Purchaser's right to notice and to negotiate provided by this Section 13.01. Seller shall not, however, during the term of this Agreement authorize or permit disposition of coal from the Cimar-

ron property to be made to anyone other than the Purchaser, execpt to the extent Seller may do so without making the economically and commercially recoverable balance of coal in the Cimarron property an amount less than the maximum tonnage to be thereafter supplied to Purchaser hereunder. Spot coal or additional coal shall not interfere in any manner with the movement of the coal contracted hereunder.

14.01. *Force Majeure.* "Force Majeure" as used herein shall mean a cause beyond the control of the Seller (its contractors and subcontractors) or Purchaser, as the case may be, which wholly or partially prevents the mining, loading or delivery of coal at or from the Cimarron property, or the receiving, transporting or delivering of coal by the railroads, or the unloading, storing or burning of coal by Purchaser at its destination. Examples(without limitations) of *force majeure,* but only if beyond the control of Seller (its contractors and subcontractors) or Purchaser, as the case may be, are the following: Acts of God, acts of the public enemy, insurrections, riots, strikes, labor disputes, labor or material unavailability, fires, explosions, floods, breakdowns of or damage to plants, mines equipment or facilities, faults in coal seams, interruptions to or contingencies or facilities, faults in coal seams, interruptions to or contingenies of transportation, embargoes, orders or acts of civil (including, without limitation, a city or county ordinance or regulation, an act of a state legislature and an act of the United States Congress) or military authority, and material reduction in the Purchaser's customers' demand for power. If because of *force majeure* either Purchaser or Seller is unable to carry out its obligation under this Agreement, and if such party promptly

gives the other party hereto written notice of such *force majeure,* the obligations and liabilities of the party giving such notices and the corresponding obligations of the other party shall be suspended to the extent made necessary by and during the continuance of such *force majeure;* provided, however, that the disabling effects of such *force majeure* shall be eliminated as soon as and to the extent possible.

In the event that during the continuance of this Agreement, any legal restrictions are imposed which restrict Purchaser from burning the coal to be supplied by Seller under this Agreement, any such restriction shall be deemed to be an event of *force majeure* under this Agreement unless its effect can reasonably be avoided as hereinafter provided. If any such restriction is imposed, Purchaser shall promptly consider what steps can be taken in the handling and combustion of coal at Purchaser's plants to avoid such rstriction, and if such steps are reasonable available, which in Purchaser's judgment are feasible and will not result in unreasonable expense to Purchaser, Purchaser shall promptly take such steps, and such event of *force majeure* shall be deemed eliminated. If no such steps are available or if Purchaser in its judgment determines such steps are not reasonable or will result in unreasonable expense to Purchaser, Purchaser shall so advise Seller. Thereupon Purchaser and Seller shall promptly consider what steps can be taken in the mining and preparation of coal at Seller's mine to avoid such restriction, and if in Purchaser's judgment such steps are available at a reasonable expense, such steps will be taken and the Base Price shall be increased to compensate Seller for any such additional expense incurred by it in taking such steps. No expense contem-

plated by this paragraph shall be deemed reasonable if it would result in a delivered price of coal in excess of the delivered price of competitive fuels or sources then available to Purchaser.

Any deficiencies in the production or sale of coal hereunder caused by *force majeure* shall not be made up except by mutual consent nor shall the term of this Agreement be extended by a *force majeure*. In the event *force majeure* reduces Purchaser's obligation to purchase coal hereunder, except where Seller does not offer coal which avoids the restriction referred to in the preceding paragraph, the minimum quantity of coal to be sold to Purchaser hereunder shall be that percentage of Purchaser's total requirements of rail delivered coal (as reduced by reason of *force majeure*) which equals Seller's percentage hereunder of the total requirements of rail delivered coal under all Purchaser's contracts (having a term of more than three (3) years) for the purchase of coal in effect immediately before the taking effects of such *force majeure*.

Notwithstanding the definition of the term *force majeure* above, no cause shall excuse Purchaser or Seller from full performance insofar as its obligations under Sections 5.03 and 5.04 unless the cause is one which is determined by the Louisville and Nashville Railroad Company to be an event of *force majeure* under the provisions of the applicable tariff and applicable supplements thereto. The construction, interpretation and application of the applicable tariff *force majeure* provisions made by the responsible Louisville and Nashville Railroad Company official shall be binding upon the parties for this purpose.

15.01. *Assumption of Risks.* Any party to this Agreement, whose agent or property shall go or be placed on the premises of the other party in order to implement the terms of this Agreement, assumes the risk of injury or death to such agent and damages to such property, and will indemnify and hold the other party harmless against all loss or liability from whatever source, including the sole or joint negligence of the other party, arising on account of any such injury, death or damage.

16.01. *Sales and Use Taxes.* Purchaser shall pay all sales or use taxes applicable to the sale or use of coal sold hereunder.

17.01. *Construction of Railway Track.* Both parties shall use their best efforts to encourage carrier to complete construction of railway track from its existing track to the unit train loading facility by October 1, 1969. Such track extension shall be made at no cost to Purchaser.

18.01. *Binding Effect.* This contract shall bind and inure to the benefits of the parties, their successors and assigns under Section 19.01.

19.01. *Assignments.* Neither party may assign this contract or any rights or obligations hereunder without the prior written consent of the other party, but such consent shall not be reasonably withheld.

20.01. *Arbitration.* Any unresolved controversy between the parties, arising under this Agreement shall, at the request of either party, be submitted to arbitration under the rules of the American Arbitra-

tion Association. The cost and expense of any arbitration shall be shared equally by the parties, unless otherwise ordered by the arbitrator.

21.01. *Waiver.* The failure of either party to insist on strict performance of any provisions of this Agreement, or to take advantage of any right hereunder, shall not be construed as a waiver of such provision or right.

22.01. *Remedies Cumulative.* Remedies provided under this Agreement shall be cumulative and in addition to other remedies provided by law, provided all such remedies shall be subject to the preceding requirement of arbitration.

Seller shall, within 24 hours of the receipt thereof by Seller, mail Purchaser (at Purchaser's address as set forth in Section 23.01) a copy of any notice of default by Seller in the observance or performance of Seller's convenants and obligations (or any of them) under any of the leases identified on Exhibit 1; upon receipt of any such copy, Purchaser shall have the right (but not the obligation) to correct for the account of Seller any default contained in such notice and to deduct from amounts due or to become due to

Seller hereunder the cost of correction thereof together with interest thereon at the rate of six per cent (6%) per annum.

23.01. *Notices.* Any notice, request, protest, consent, demand, report or statement given by one party to the other shall be in writing and deemed duly received seventy-two (72) hours after it is deposited

in the United States mail, postage prepaid, and properly addressed as follows:

(1) If to Purchaser,

Mr. E. I. Hatch, President
Georgia Power Company
P. O. Box 4545
Atlanta, Georgia 30302

(or to such other person or address as Seller shall have designated by due notice to Purchaser.

(2) If the notice is to Seller,

Mr. Robert Anderson, Jr.
Cimarron Coal Corporation
P. O. Box 89
Madisonville, Kentucky 42431

(or to such other person or address as Seller shall have designated by due notice to Purchaser).

24.01. *Captions.* The captions to sections hereof are for convenience only and shall not be considered in construing the intent of the parties.

25.01. *Applicable Law.* This Agreement shall be construed under the laws of the State of Georgia.

26.01. *Adjustments for Gross Inequities.* Any gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of the execution of this Agreement may be corrected by mutual consent. Each party shall in the case of a claim of gross inequity furnish the other with whatever documentary evidence may be necessary to assist in affecting a settlement.

Nothing contained in this section shall be construed as relieving either the Purchaser or Seller from any of its respective obligations hereunder solely because of the existence of a claim of inequity or the failure of the parties to reach an agreement with respect thereto.

27.01. *Replacement Coal.* In the event Seller fails to produce and tender for delivery coal from the reserves dedicated herein an amount of coal sufficient to meet the delivery requirements hereunder for the primary period, or any applicable option period, Seller will supply coal of equal quality from other sources and upon the same terms and conditions herein.

Seller agrees to notify Purchaser in writing of its intention to supply coal from other sources. Purchaser shall have the right to approve the proposed substitution, but approval shall not be unreasonably withheld.

Any coals substituted hereunder shall be priced such that the delivered-to destination-cost per million Btu to Purchaser shall not exceed the then existent delivered-to destination-cost per million Btu of the coal most recently supplied to Purchaser by Seller from the Cimarron property. "Destination" for the purpose of this paragraph only shall mean Purchaser's generating station now under construction on the Etowah River near Cartersville, Georgia.

28.01. *Entire Agreement.* This instrument contains the entire agreement between the parties, and there are no represetntations, understanding or agreements, oral or written, which are not included herein.

This Agreement cannot be changed except by duly authorized representatives of both parties in writing.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers.

GEORGIA POWER COMPANY

By: H. L. BOWEN
Vice President

CIMARRON COAL CORPORATION

By: ROBERT ANDERSON, JR.
President

ATTEST:

C. L. RATTERREE
Asst. Secretary

ATTEST:

WILLIAM E. LEGHON
Asst. Secretary

EXHIBIT 1

A. *POND RIVER - FIES PROPERTIES*

1. Lease by Diamond Trust to Cimarron Coal Corporation dated January 27, 1969, covering following properties:

(a) Property acquired by Diamond Trust from Island Creek Coal Company by Deed dated June 28, 1968, and recorded in Book 319, Page 555, Hopkins County Clerk's office.

Tracts identified on Island Creek property map D-11 as:

Tract 250 — Todd
Tract 251 — Todd
Tract 252 — Todd
Tract 253 — Slayton
Tract 254 — Smith
Tract 255 — Cavanah
Tract 256 — Hanner
Tract 257 — Parker
Tract 266 — Slaton
Tract 267 — Short
Tract 268 — Browder
Tract 269 — Slaton
Tract 270 — Fugate
Tract 271 — Browder
Tract 408 — Slaton

(b) Easements acquired by Diamond Trust from Island Creek Coal Company by conveyance dated September 27, 1968, and recorded in Book 321, Page 109 Hopkins County Court Clerk's office applicable to the following tracts identified on Island Creek property map D-11 as:

Tract 254-A — Smith
Tract 257 — Parker
Tract 267 — Short
Tract 266 — Slaton
Tract 271 — Browder

(c) Property acquired by Diamond Trust from L. R. Slayton, et ux., by Deed dated January 3, 1969, and recorded in Book 322, Page 492, Hopkins County Court Clerk's office.

(d) Property leased by Diamond Trust from Neva Sisk and husband, Ed Sisk, under lease dated September 10, 1968.

(e) Property acquired by Diamond Trust from Peabody Coal Company by Deed dated January 22, 1969, and recorded in Book 323, Page 78, Hopkins County Court Clerk's office.

2. Quitclaim Deed by Badgett Mine Stripping Corporation to Cimarron Coal Corporation dated January 1, 1969, covering property conveyed by Sherman Littlepage, et ux., to Badgett Mine Stripping Corporation by Deed dated June 2, 1965, and recorded in Book . . ., Page . . ., Hopkins County Court Clerk's office.

3. Quitclaim by Rogers Badgett, et ux., to Cimarron Coal Corporation dated January 1, 1969, and recorded in Book . . ., Page . . ., Hopkins County Court Clerk's office covering property conveyed by Jessie Noble Slaton to Rogers Badgett by Deed dated October 24, 1964, and recorded in Book 293, Page 396, Hopkins County Court Clerk's office.

B. *CIMARRON* (Trust No. 1)

Lease by Russell Badgett, Jr., Trustee to Cimarron Coal Corporation dated August 28, 1967, and recorded in Book . . , Page . . , Hopkins County Court Clerk's office covering property conveyed to Russell Badgett, Jr., Trustee by Island Creek Coal Company by Deed dated . . . . . , 19 . . , and recorded in Book 289, Page 416, Hopkins County Court Clerk's office.

C. *WHITE PLAINS* (Trust No. 2)

1. Lease by Russell Badgett, Jr., Trustee, to Cimarron Coal Corporation dated January 1, 1969, and recorded in Book . . , Page . . , Hopkins County Court Clerk's office covering the following property:

   (a) Property conveyed to Russell Badgett, Jr., Trustee, by Island Creek Coal Company by Deed dated . . . . . , 19 . . , and recorded in Book 317, Page 548, Hopkins County Court Clerk's office.

   (b) Property leased by Russell Badgett, Jr., Trustee from Dow Mercer, et ux., under lease dated April 24, 1968, recorded in Book 86, Page 155, Hopkins County Court Clerk's office.

2. Property subleased to Cimarron Coal Corporation by Rogers Badgett, et ux., by sublease dated January 1, 1969, recorded in Book . . , Page . . , Hopkins County Court Clerk's office covering property leased by Harlan R. Allen, et ux., et al., by lease dated November 9, 1967, and recorded in Book 83, Page 561, Hopkins County Court Clerk's office.

3. Property quitclaimed to Cimarron Coal Corporation by Badgett Mine Stripping Corporation by Quitclaim Deed dated January 1, 1969, recorded covering the property conveyed by Virgil D. Scott, et ux., et al., by Deed dated August 28, 1964, and recorded in Book 293, Page 16, Hopkins County Court Clerk's office.

EXHIBIT "3"

CIMARRON COAL CORPORATION

ITEM

1. *Wage Rates - Production Employees - January 1, 1969*

Wage Classification	Straight Time Per Hour	
Shovel and Dragline Operator 4 - 8 Cu Yd.	(1)	$4.765
Shovel and Dragline Oiler Over 2 1/2 Cu. Yd.	(1)	$4.215
Bulldozer Operators Over D-6 or Equivalent	(1)	$4.415
Grader Operator	(1)	$4.415
Overburden & Coal Driller & Shooters	(1)	$4.065
Pit Mechanic (First Class)	(1)	$4.415
Pit Mechanic (Second Class)	(1)	$4.265
Pit Welder	(1)	$4.265
Tractor - Truck Driver 7 Tons & Over	(1)	$4.165
Tipple Mechanic (First Class)	(1)	$4.415
Tipple Mechanic & Welder	(1)	$4.065
Tipple Operator	(1)	$4.065

Tipple Loading Boom Operator	(1)	$4.065
Car Cleaner, Car Dropper, Load Rider	(1)	$3.865
	14	$59.460

Arithmetic Average Wage Scale Rate = $\frac{\$59.460}{14} = \$4.247$

Note: Extra per hour for second shifts eight cents and for third shift ten cents.

2. *Fringe Benefits*

Hospitalization Insurance—$32.91 average per employee. Selective Incentive Bonus based on 10c/ton mined.

3. *Welfare Payment Rates*

None

4. *Federal Insurance Contributions Act and State and Federal Unemployment Tax Acts*

Federal Insurance Contributions Act—4.8% of each employee's gross pay up to $7,800.00 per year.

State Unemployment Tax—2.7% of each employee's gross pay up to $3,000.00 per year.

Federal Unemployment Tax—0.40% of each employee's gross pay up to $3,000.00 per year.

5. *Workmen's Compensation*

Classification	Rates Per $100 of Wages
Clerical	0.04
Surface Mining	2.58

6. *Working Conditions*

None

7. *Property Taxes*

(Based on an assessment equal to 100% for fair market value)

County	Tax Per $100 of Assessment
Hopkins County	$1.09

8. *Severance County*

None

9. *Other Taxes or Burdens*

Gross Reclamation cost per ton—$0.07

* * * *

The listing of the Classification in item 1 above is not intended to preclude or limit the addition of employees in a new job Classification or different Job Classification not so listed.

If any labor cost or governmental imposition is in existence as of January 1, 1969 but is not included in the above schedule, discovery of such cost or imposition shall not vary the Base Price per ton except to the extent of any increase or decrease of such cost or imposition occurring after January 1, 1969.

EXHIBIT "4"
LABORATORY PROCEDURES

(A) *Air Drying—Laboratory Sample*

The sample (including container with lid and pan) will be weighed on a balance with a sensitivity of not less than 0.5 gram. The coal will be spread out in a non-corroding pan and of sufficient size that the depth is not more than one inch, the pan with the coal, container and lid will be placed in an air-drying oven

with a temperature of 0-15°C above room temperature and will be air-dried until the loss in weight is not more than 0.1% in one hour. Before final weight is taken, air will be circulated through the oven with heat turned off for at least two hours and the coal then removed to the sample preparation area so that the temperature and condition of the coal will be in equilibrium with the air in the room where further sample preparation is to be done. The weight of the coal plus pan plus container and lid will be recorded and the air-drying loss will be calculated as follows:

$$\% \text{ Air Drying Loss} = \frac{W_1 - W_2}{W_1 - W_3} \times 100$$

Where W_1 = Wet weight of coal + pan + container + lid

W_2 = Air dry weight of coal + pan + container + lid

W_3 = Weight of empty pan + container + lid

(B) *Residual Moisture*

A residual moisture sample of from 50 to 100 grams will be divided out by riffling, using an enclosed riffle, with 24 three-eights inch divisions, from the air-dried U.S. No. 8 coal. This will be placed in an air-tight bottle and mixed on wheel mixer. As an alternate to riffling, the 50 to 100 gram sample will be secured by taking small spoonsful from the air-dried coal spread out over the pan.

The residual moisture in the air-dried coal will be

determined by weighing on an analytical balance approximately 10 grams of coal to an accuracy of ± 1 Mg. into a tared aluminum box (approximately 75 mm in diameter and 19mm in height) which has been previously dried, cooled in dessicator and then tared. This will be placed in a box type forced air oven, similar to Thelco Oven Model No. 18, Fisher Isotemp or equivalent, maintained at a temperature of 104-110°C for a period of one and one-half hours. The lid will be placed on the box, removed from the oven and placed in a dessicator containing indicating grade aluminum oxide for about thirty minutes or until cool before weighing on an analytical balance. The percent loss in weight will be the residual moisture.

(C) *Total Moisture Calculation*

$$\% \text{ Total Moisture} = \frac{(100 - \% \text{ Air Drying Loss}) \times \text{Residual Moisture}}{100} + \text{Air Drying Loss}$$

(D) *Pulverizing—Laboratory Sample*

The entire sample left after the residual moisture has been removed will be reduced in an enclosed pulverizer, (Holmes design or equivalent) to approximately U.S. No. 60. The sample will be divided to a minimum of 50 grams by riffling using an enclosed riffle with 24 three-eights inch divisions. The minimum of 50 grams will be screened on a U.S. No. 60 Sieve, any oversize will be crushed in an agate mortar or equivalent to pass the U.S. No. 60 Sieve and will be put back with that passing the No. 60 Sieve. The sample will be placed in an airtight bottle and mixed for a minimum

of fifteen minutes on a wheel mixer. The sample will then be ready for the laboratory determinations.

(E) *Moisture—U.S. No. 60 Sample*

The moisture in the U.S. No. 60 coal will be determined on approximately one gram in a porcelain capsule 7/8″ in depth and 1-3/4″ in diameter. A well fitting aluminum cover will be provided for covering the capsule during weighing and after drying. Approximately one gram of coal will be weighed to an accuracy of ± 0.5 Mg. in the capsule which has been previously dried, cooled in dessicator and then tared. The capsule (with lid off) containing the coal will be dried in a box type oven with forced air circulation, similar to Thelco Oven Model 18, Fisher Isotemp or equivalent, maintained at a temperature of 104-110°C for one hour. The lid will be placed on the capsule, the covered capsule will be removed from oven and placed in a dessicator containing indicating grade aluminum oxide for about 30 minutes, or until cool before weighing. The percent loss in weight will be the percent moisture in the U.S. No. 60 Coal.

(F) *Ash*

For the ash determination, the porcelain capsules containing the dried coal from the 60 mesh moisture determination will be placed in a cold electric muffle furnace and the temperature gradually raised to 700-750°C at a rate to avoid mechanical loss from too rapid expulsion of volatile matter. The ignition will be finished to constant weight (+ 0.001 g) at a temperature of 700-750°C. The capsule containing the ash will be placed in the dessicator and weighed as soon as cold.

(G) *Volatile Matter*

Volatile matter, when required, will be determined by the method in ASTM Designation D271-64 paragraphs 16, 17 and 18. The Fieldner electric type furnace will be used.

(H) *Calorific Value*

The gross calorific value (gross heat of combustion) in British thermal units (Btu) will be determined using a calorimeter for which radiation corrections are determined or the Parr Adiabatic Calorimeter or equivalent as given in ASTM Designation D271-64 paragraphs 51 to 55 and ASTM Designation D2015-66.

(I) *Sulfur*

Sulfur will be determined using t... Eschka method or the bomb washing method as given in ASTM Designation D271-64 paragraphs 21-26 inclusive.

(J) *Ash Softening Temperature*

The ash softening temperature, when required, will be determined by the methods given in ASTM Designation D1857-66T.

(K) *Calculations*

Calculations of ash, volatile matter, Btu and sulfur will be made as follows:

$$\text{Dry Basis} = \frac{\text{Uncorrected (as weighed U.S. No. 60 Sample) Results} \times 100}{100 - (\%\ \text{Moisture in U.S. No. 60 Cample})}$$

$$\text{As Received Basis} = \frac{(100 - \%\ \text{Total Moisture}) \times (\%\ \text{Dry Basis})}{100}$$

EXHIBIT "5"

SAMPLE CALCULATIONS
CHANGE IN WAGE SCALE RATES

(All figures shown are hypothetical and have no particular significance to the parties to this contract.)

Wage Classifications	Wage Scale Rates Per Hour	(April 1, 1966) Per Day
1. Shovel Runner	$4.10	$29.73
2. Electrician	$3.85	$27.90
3. Truck Mechanic	$3.85	$27.90
4. Welder	$3.85	$27.90
5. Bulldozer Operator	$3.75	$27.19
6. Craneman	$3.73	$27.07
7. Fireman	$3.61	$26.18
8. Washerman	$3.57	$25.86
9. Rock Driller	$3.56	$25.79
10. Jack Hammer Operator	$3.56	$25.79
11. Oiler	$3.55	$25.74
12. Tractor Operator	$3.51	$25.48
13. Driver—Large Truck	$3.51	$25.48
14. Ground Shovel	$3.50	$25.39
15. Jigman	$3.47	$25.15
16. Tippleman	$3.45	$24.98
17. Rock Driller Helper	$3.45	$24.98
18. Truck Driver—less than 8-ton capacity	$3.43	$24.85

The wage classifications are 18 in number ranging from $4.10 per hour to $3.43 per hour and average arithmatically $3.63 per hour—Base Average Wage Scale Rate. Seller represented $0.75/ton labor component in Base Price of coal under contract.

On October 1, 1968 Seller notifies Purchaser of wage escalation as a result of U.M.W.A. Wage Agreement. Seller provides Purchaser with the following wage classifications and new wage scale rates:

Wage Classification	Wage Scale Rates Per Hour	(October 1, 1968) Per Day
1. Shovel Runner	$4.56	$33.03
2. Electrician	$4.28	$31.04
3. Electrician Helper	$4.17	$30.20
4. Truck Mechanic	$4.28	$31.04
5. Welder	$4.28	$31.04
6. Bulldozer Operator	$4.17	$30.24
7. Motor Grader Operator	$4.17	$30.24
8. Front End Loader Operator	$4.17	$30.24
9. Washerman	$4.03	$29.20
10. Driller	$4.04	$29.31
11. Jack Hammer Operator	$4.04	$29.31
12. Oiler	$4.08	$29.61
13. Tractor Operator	$3.99	$28.95
14. Driver—Large Truck	$4.03	$29.23
15. Groundman—Shovel	$4.20	$30.42
16. Groundman—Shovel	$3.98	$28.84
17. Jigman	$3.95	$28.66
18. Tippleman	$3.94	$28.54
19. Barge Loader	$3.94	$28.54
20. Driller Helper	$3.94	$28.57
21. Truck Driver—8 ton or less	$3.91	$28.35
22. Coal Auger Operator	$4.05	$29.33
23. Coal Auger Helper	$3.93	$28.51
24. Shooter	$4.04	$29.31
25. Cable Puller Operator	$4.17	$30.24

The wage classifications effective October 1, 1968 are 25 in number ranging from $4.56 per hour to $3.91

per hour and average arithmetically $4.09 per hour—New Average Wage Scale Rate.

New Average Wage Scale Rate	$4.09
Base Average Wage Scale Rate	$3.63
Difference	$0.46 (increase)

$0.46 ÷ $3.63 = 12.67% increase
0.1267 × $0.75 = $0.09525 or $0.10 per ton increase

Base Price specified in Contract f.o.b. mine	$4.03/ton
Increase—effective October 1, 1968	$0.10
New Price f.o.b. Mine	$4.13

AMENDMENT TO COAL SUPPLY AGREEMENT

THIS AMENDMENT is made and entered into as of the 1st day of January, 1973, by and between GEORGIA POWER COMPANY, a corporation organized and existing under the laws of the State of Georgia, and having its principal office in the City of Atlanta, Georgia ("Purchaser"), and CIMARRON COAL CORPORATION, a corporation organized and existing under the laws of the State of Tennessee, and having its principal office in the City of Madisonville, Kentucky ("Seller").

WITNESSETH:

In consideration of the mutual convenants contained herein, the parties hereby amend the Coal Supply Agreement entered into by the parties on the 6th day of February 1969 as follows:

1. Section 2.01 of the Coal Supply Agreement is amended by deleting the first sentence of said section and substituting in the place thereof the following:

> "Except as the term hereof is extended to provide for coal shipments in 1980 pursuant to Section 7.01, as amended, the term of this Agreement shall be ten (10) years commenc- in January 1, 1970."

2. Section 7.01 of the Coal Supply Agreement is amended by deleting the section in its entirely and

substituting in its place a new Section 7.01 which shall read as follows:

"*Quantity Requirements.* Seller will tender for delivery, and Purchaser will buy the following quantities of coal:

(a) 1,400,000 tons during the calendar year of 1970;

(b) 1,400,000 tons during the calendar year of 1971;

(c) 1,400,000 tons during the calendar year of 1972;

(d) 1,600,000 tons during the calendar year of 1973, provided that either party, upon ninety (90) days written notice may require shipments for the remainder of the calendar year at an annual rate of 2,100,000 tons;

(e) 2,100,000 tons during each of the calendar years 1974 through 1979,

(f) 700,000 tons during the calendar year of 1980 plus an additional amount equal to the difference between 2,100,000 and the number of tons actually shipped during 1973."

Except as provided herein, the Coal Supply Agreement executed by the parties on February 6, 1969 is not otherwise modified or amended.

IN WITNESS WHEREOF, the parties have

caused this Amendment to be executed by their duly authorized officers, as of the date and year first above written.

GEORGIA POWER COMPANY

By: R. W. SCHERER
Vice President

CIMARRON COAL CORPORATION

By: ROBERT ANDERSON, JR.
President

Attest:

C. L. RATTERREE
Assistant Treasurer

Attest:

EMMITT D. ANDERSON

AMENDMENT TO COAL SUPPLY AGREEMENT

This Amendment executed this 20th day of November, 1973, to the Coal Supply Agreement dated February 6, 1969, as amended January 1, 1973, by and between Cimarron Coal Corporation (Seller) and Georgia Power Company (Purchaser)

WITNESSETH:

For and in consideration of the benefits set forth herein and the mutual promises of the parties hereto, Seller and Purchaser do hereby agree to further amend said Coal Supply Agreement as follows:

1. By adding a new section thereto which will provide as follows:

3.07. *Adjustments for Changes in Cost of Supplies.* Adjustments for changes in the gross cost of supplies used in the production of coal for delivery under this Agreement shall be made in the following manner:

Any changes in the base price of supplies shall be made by determining periodically the percentage change which shall have occurred since July, 1973, in a composite of the following price indices published by the United States Bureau of Labor Statistics in the following respective relative weights:

Commodity	BLS Code Number	Relative Weight
Construction Machinery & Equipment	112	50.0
Petroleum Products—Refined	057	10.0

Electric Power	054	10.0
Explosives	0679-02	15.0
Tires and Tubes	0712	8.0
Wire and Cable	1026	7.0
		100.0

Any changes on or after January 1, 1974, in the base price of supplies shall be based on changes in a composite index number for January and July of each calendar year during the life of this Agreement. The percentage change in said index from 128.5 (the level of such index for July, 1973 on the basis that the year 1967 = 100) shall be determined semi-annually to be effective January 1 and July 1 and shall be applied to $1.50, such $1.50 being the per ton amount of the supplies cost component of the Base Price for purposes of this Section 3.07. The resulting amount, less previous adjustments made under this section, shall be added to or substracted from, as the case may be, the Base Price in effect in the beginning of the month for which the composite index number is computed, and shall govern until the beginning of the next succeeding January or July, as the case may be.

In the event of a published change or revision in the base for any of the components of said indices or if a new base is adopted, the revised or new index shall be adjusted to said base of 1967 equals 100. If such index is discontinued or otherwise becomes unavailable, the parties shall utilize a mutually satisfactory substitute method of price adjustment for materials and supplies.

An example of how the provisions of this section are intended to operate is shown in Exhibit 6 attached hereto and made a part hereof.

2. By adding a new section thereto, which shall provide as follows:

3.08. *Computation of Adjustment for Changes in Supervisory Labor Cost.* Adjustments for change in the cost of supervisory labor at the mine shall be made in the following manner:

If after July 1, 1973, any revision in the base price as results from any collective bargaining agreement lawfully entered into by Seller or pursuant to changes in national or regional bituminous coal union wage agreements is made relative to Section 3.03 hereunder, then beginning with the effective date of such revision, the base price shall be further increased or decreased, as the case may be, by an amount determined by multiplying that percentage change in the average wage scale rate, when compared to the base wage scale rate* as calculated for hourly employees under Section 3.03, times $0.152, such $0.152 being the total per ton cost of supervisory labor in effect July 1, 1973. (*Base wage scale rate as used in this Section 3.08 shall mean the average wage scale rate for producing, washing or loading coal sold hereunder on the effective date of the last adjustment.)

Under no circumstances shall Purchaser be required to compensate Seller for any increase which exceeds that percentage increase in daily wage rates as results from the change in national or regional bituminous coal union wage agreements.

The job classifications used in said supervisory labor cost in effect on July 1, 1973, are set forth in Exhibit 7 attached hereto and made a part hereof.

3. Section 7.01 of the Coal Supply Agreement is amended by deleting the section in its entirety and substituting in lieu thereof the following:

7.01. "*Quantity Requirements.*" Seller will tender for delivery, and Purchaser will buy the following quantites of coal:

(a) 1,400,000 tons during the calendar year of 1970;

(b) 1,400,000 tons during the calendar year of 1971;

(c) 1,400,000 tons during the calendar year of 1972;

(d) 1,600,000 tons during the calendar year of 1973;

(e) 1,600,000 tons during the calendar year of 1974, provided that either party upon ninety (90) days written notice may require shipments for the remainder of the calendar year at an annual rate of 2,100,000 tons;

(f) 2,100,000 tons during each of the calendar years 1975 through 1979;

(g) 1,200,000 tons during the calendar year of 1980 plus an additional amount equal to the difference between 2,100,000 and the number of tons actually shipped during 1974.

4. Except as provided herein and in the Amendment to Coal Supply Agreement executed January 1, 1973, the Coal Supply Agreement dated February 6, 1969, is not otherwise altered or modified as is in all respects ratified and affirmed.

In Witness Whereof, the parties have caused this Amendment to their Agreement to be duly executed and attested in several counterparts, under their respective corporate seals and by their respective corporate officers thereunto duly authorized, all on the date first mentioned above.

GEORGIA POWER COMPANY

By:
Executive Vice President

Date Executed November 20, 1973

CIMARRON COAL CORPORATION

By: ROBERT ANDERSON, JR., *President*
Chief Executive Officer

Date Executed December 26, 1973

(Seal)

ATTEST

By: EMMITT B. ANDERSON
Assistant Secretary

(Seal)

ATTEST

By: R. W. SHERER
Assistant Secretary

EXHIBIT "6"
Illustration of Price Change as Referred to in Section 3.07

Commodity	BLS Code Number	Relative Weight	Base Index July 1973	Base Weighted July 1973	Index Number Jan. 1974	Weighted Index Jan. 1974
Construction Machinery and Equipment	11.2	50.0	131.3	65.7	133.6	66.8
Petroleum Products—Refined	05.7	10.0	146.1	14.6	156.6	15.7
Electric Power	05.4	10.0	129.0	12.9	132.1	13.2
Explosives	06.79-02	15.0	117.9	17.7	123.6	18.5
Tires and Tubes	07.12	8.0	110.4	8.8	115.1	9.2
Wire and Cable	10.26	7.0	126.1	8.8	126.8	8.9
				128.5		132.3

Index Number January 1974*	132.3
Base Index Juy 1973	128.5
Increase in Index	3.8

$3.8 \div 128.5 = 2.95\%$

$2.95 \times \$1.50$ per ton $= \$0.04$ increase per ton

* Based upon arbitrary figures.

EXHIBIT "6"

Illustration of Price Change as
Referred to in Section 3.07

Commodity	BLS Code Number	Relative Weight	Base Index July 1973	Base Weighted July 1973	Index Number Jan. 1974	Weighted Index Jan. 1974
Construction Machinery and Equipment	11.2	50.0	131.3	65.7	133.6	66.8
Petroleum Products—Refined	05.7	10.0	146.1	14.6	156.6	15.7
Electric Power	05.4	10.0	129.0	12.9	132.1	13.2
Explosives	06.79-02	15.0	117.9	17.7	123.6	18.5
Tires and Tubes	07.12	8.0	110.4	8.8	115.1	9.2
Wire and Cable	10.26	7.0	126.1	8.8	126.8	8.9
				128.5		132.3

Index Number January 1974*	132.3
Base Index Juy 1973	128.5
Increase in Index	3.8

3.8 ÷ 128.5 = 2.95%

2.95 × $1.50 per ton = $0.04 increase per ton

* Based upon arbitrary figures.

EXHIBIT "7"

Supervisory Job Classifications
as of July 1, 1973

(1) President
(2) Vice President/Mine Superintendent
(3) Secretary and Treasurer
(4) General Office Secretary
(5) Pit Foreman (3)
(6) Equipment Maintenance Foreman
(7) Preparation Plant Foreman
(8) Supply House Clerk
(9) Mine Office Clerk

AMENDMENT TO COAL SUPPLY AGREEMENT

THIS AGREEMENT, made and entered into this 19th day of ....., 1974, by and between GEORGIA POWER COMPANY, a corporation organized and existing under the laws of the State of Georgia, and having its principal office in the city of Atlanta, Georgia ("Purchaser") and CIMARRON COAL CORPORATION, a corporation organized and existing under the laws of the State of Tennessee, and having its chief principal office in the city of Madisonville, Kentucky ("Seller").

WITNESSETH:

WHEREAS, the Purchaser and Seller have heretofore entered into a Coal Supply Agreement dated February 6, 1969, which was subsequently amended as of January 1, 1973, and November 20, 1973, (hereinafter the "Agreement"), whereby Seller dedicated certain acreages in Hopkins County, Kentucky, containing more than 20,000,000 tons of economically recoverable coal to the fulfillment of said Agreement;

WHEREAS, Seller represents and warrants that, through the instruments identified on Exhibit "1A" attached hereto and made a part hereof, it has acquired control of additional acreages in Hopkins County, Kentucky, which contain more than 7,000,000 tons of coal that can be economically recovered by surface mining methods; and

WHEREAS, the parties desire to modify and amend the Agreement hereinafter provided;

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter set forth, it is hereby agreed that the Agreement be modified and amended in the following respects:

1.

The Agreement is amended by adding after the third paragraph on Page 1 a new paragraph which provides as follows:

> "Seller represents and warrants that it controls, through the instruments identified on Exhibit "1A" attached hereto and made a part hereof, certain additional acreages in Hopkins County, Kentucky, which contain more than 7,000,000 tons of coal that can be economically recovered by surface mining methods and which Seller dedicates to the fulfillment of this Agreement."

2.

The Agreement is further amended by attaching thereto as Exhibit "1A" the exhibit designated "1A" which is attached to this Amendment and made a part hereof.

3.

Section 2.01 of the Agreement is amended by deleting the section in its entirety and inserting in lieu thereof the following:

> "*Term of Agreement.* The term of this Agreement shall extend until all mineable and merchantable coal on the property identified on Exhibits "1" and "1A" has been mined, removed and sold to Purchaser.

4.

Section 7.01 of the Agreement is amended by deleting the section in its entirety and substituting in lieu thereof the following:

"*Quantity Requirements.* Seller will tender for delivery and Purchaser will buy the following quantities of coal:

(a) 2,100,000 tons during each of the calendar years 1974 through December 31, 1980;

(b) 2,100,000 tons during each of the calendar years during the remainder of the term of this Agreement; or so much thereof as is merchantable and economically recoverable from the reserves dedicated to this Agreement."

The annual tonnage requirements as provided by this Section 7.01 hereof, shall be delivered by Seller and accepted by Purchaser in approximately equal monthly quantities or as otherwise mutually agreed to by the parties hereto.

5.

Except as herein provided, the Coal Supply Agreement dated February 6, 1969, as amended as of January 1, 1973, and November 20, 1973, is not otherwise altered or modified and is in all respects ratified and affirmed.

IN WITNESS WHEREOF, the parties have caused this Amendment to the Coal Supply Agreement to be duly executed and attested in several counterparts, under their respective corporate seals and

by their respective corporate officers thereunto duly authorized, all on the date first mentioned above.

(Seal)

GEORGIA POWER COMPANY

By: R. W. SCHERER
Executive Vice President

Date Executed 9-19, 1974

CIMARRON COAL CORPORATION
By: ROBERT ANDERSON, JR.
President

Date Executed 9-23, 1974

ATTEST:

By: C. L. RATTERREE
Assistant Secretary

(Seal)

ATTEST:

By: EMMETT D. ANDERSON
Secretary

EXHIBIT "1A"

A. *POND RIVER — FIES PROPERTIES*

1. Property acquired by Diamond Trust from Peabody Coal Company dated September 18, 1972, covering property conveyed to Peabody from Terteling Brothers by Deed dated May 22, 1953, and record in Book 220, Page 592, Hopkins County Court Clerk's office.

(a) Property leased by Diamond Trust from W.

B. Dozier and Lulu Hickman under lease dated July 7, 1971.

(b) Property acquired by Diamond Trust from Island Creek Coal Company by Deed dated August 30, 1971, and recorded in Book 340, Page 184, Hopkins County Court Clerk's office.

2. Property acquired by Diamond Trust from William C. Davis dated March 4, 1972, and covering property conveyed by Ervin Sheets to William C. Davis by Deed dated November 17, 1966, and recorded in Book 308, Page 157, Hopkins County Court Clerk's office.
3. Property leased by Diamond Trust from Russell Badgett, Sr., covering property conveyed to Russell Badgett, Sr., from Badgett Mine Stripping Corporation dated June 15, 1970, covering property conveyed to Badgett Mine Stripping Corporation from West Kentucky Coal Company, (Newcoal Farm), dated July 31, 1963, and recorded in Book 289, Page 409, Hopkins County Court Clerk's office.

B. *CIMARRON* (Trust No. 1)

1. Property acquired by Cimarron Coal Corporation from Lawrence Springfield by Deed dated July 22, 1969, and recorded in Book 326, Page 57, Hopkins County Court Clerk's office.
2. Property acquired by Cimarron Coal Corporation from T. Gardiner Slaton by Deed dated July 22, 1969, and recorded in Book 326, Page 59, Hopkins County Court Clerk's office.
3. Property acquired by Cimarron Coal Corporation from E. E. Wilson by Deed dated July 22, 1969, and recorded in Book 326, Page 61, Hopkins County Court Clerk's office.

4. Property leased by Cimarron Coal Corporation from L. R. Slaton, et ux., under lease dated June 23, 1969.
5. Property leased by Cimarron Coal Corporation L. R. Slaton et ux., under lease dated June 23, 1969.
6. Property leased by Cimarron Coal Corporation from C. W. and W. C. Gatlin under lease dated January 22, 1972.
7. Property acquired by Cimarron Coal Corporation from James E. Slaton by Deed dated July 22, 1969, and recorded in Book 326, Page 63, Hopkins County Court Clerk's office.
8. Property leased by Cimarron Coal Corporation from Than G. Rice, et ux., under lease dated July 30, 1969.
9. Property leased by Cimarron Coal Corporation from Fletcher Slaton under lease dated July 30, 1969.
10. Property leased by Cimarron Coal Corporation from W. B. Dozier and Lulu Hickman under lease dated August 12, 1969.
11. Coal leased by Cimarron Coal Corporation from James G. Baker, et ux., under lease dated August 12, 1969.
12. Property leased by Cimarron Coal Corporation from E. E. Steff under lease dated August 24, 1969.
13. Mining lease by Cimarron Coal Corporation from I. E. and Nora Winstead under lease dated June 19, 1970.
14. Property acquired by Cimarron Coal Corporation from Raymond Winstead by Deed dated June 19, 1970, and recorded in Book 331, Page 233, Hopkins County Court Clerk's office.

P. EXHIBIT 52

AMENDMENT TO COAL SUPPLY AGREEMENT

THIS AMENDMENT executed this first day of January, 1974, to the COAL SUPPLY AGREEMENT dated Febraury 6, 1969, as amended January 1, 1973, November 20, 1973, and January 14, 1974, by and between Cimarron Coal Corporation (Seller) and Georgia Power Company (Purchaser),

WITNESSETH:

For and in consideration of the benefits set forth herein and the mutual promises of the parties hereto, Seller and Purchaser do hereby agree to further amend said Coal supply Agreement as follows:

1. Modify Section 3.07 to read as follows:

3.07. *Adjustments for Changes in Cost of Supplies.* Adjustments for Changes in Cost of supplies used in the production of coal for delivery under this Agreement shall be made in the following manner:

Any changes in the Base Price of supplies shall be made by determining periodically the percentage change which shall have occurred since July, 1973, in the average monthly price paid by Seller for Ammonium Nitrate and Diesel Fuel, and in a composite of the following price indices published by the United States Bureau of Labor Statistics and having the following respective weights:

Commodity	BLS Code Number	Weight
Construction Machinery & Equipment	112	.50
Petroleum Products - Refined	057	.03
Electric Power	054	.10
Explosives	0679-02	.03
Tires and Tubes	0712	.08
Wire and Cable	1026	.07

Any changes on or after January 1, 1974, in the Base Price of supplies shall be based on changes in the average monthly price paid by Seller for Ammonuim Nitrate and Diesel Fuel, and in a composite index number for January and July of each calendar year during the life of this Agreement. The percentage change in Ammonium Nitrate from $2.90 per hundred pounds (the average price paid for Ammonium Nitrate for the month of July, 1973) shall be determined semi-annually to be effective January 1 and July 1 and shall be applied to $.18. The percentage change in Diesel Fuel from $.170 per gallon (the average price paid for Diesel Fuel for the month of July, 1973) shall be determined semi-annually to be effective January 1 and July 1 and shall be applied to $.105. The percentage change in the said composite index from 103.6 (the level of such index for July, 1973, on the basis that the year 1967 = 100) shall be determined semi-annually to be effective January 1 and July 1 and shall be applied to $1.215. The resulting amounts, less previous adjustments made under this section, shall be added to or substracted from, as the case may be, the Base Price in effect at the beginning of the month for which the above calculations are made, and shall govern until the

beginning of the next succeeding January or July, as the case may be.

In the event of a published change or revision in the basis for any of the components of said indices or if a new basis is adopted, the revised or new index shall be adjusted to said basis of 1967 = 100. If such index is discontinued or otherwise becomes unavailable, the parties shall utilize a mutually satisfactory substitute method of price adjustment for materials and supplies.

An example of how the provisions of this section are intended to operate is shown in Exhibit 6 attached hereto and made a part hereof.

2. Except as provided herein and in the Amendments to Coal Supply Agreement dated January 1, 1973, November 20, 1973, and January 14, 1974, the Coal Supply Agreement dated February 6, 1969, is not otherwise altered or modified and is in all respects ratified and affirmed

In Witness Whereof, the parties have caused this Amendment to their Agreement to be duly executed and attested in several counterparts, under their respective corporate seals and by their respctive corporate officers thereunto duly authorized, all on the date first mentioned above.

ATTEST
By:
Secretary

GEORGIA POWER COMPANY
By R. W. SCHERER
Executive Vice President
Date Executed October 31, 1974.

ATTEST
By EMMETT D. ANDERSON
Secretary

CIMARRON COAL CORPORATION
By ROBERT ANDERSON, JR.
Chief Executive Officer
Date Executed 12-26, 1974

EXHIBIT 6

Illustration of Price Change as Referred to in Section 3.07

Commodity	BLS Code Number	Weight	Base Index July 1973	Base Weighted July 1973	Index Number Jan. 1974	Weighted Index Jan. 1974
Construction Machinery and Equipment	11.2	.50	131.3	65.7	135.6	67.8
Petroleum Products — Refined	05.7	.03	129.1	3.9	166.4	5.0
Electric Power	05.4	.10	129.0	12.9	137.5	13.8
Explosives	06.79-2	.03	117.9	3.5	138.5	4.2
Tires and Tubes	07.12	.08	110.4	8.8	118.0	9.4
Wire and Cable	10.26	.07	126.1	8.8	140.4	9.8
				103.6		110.0

Index Number January 1974 110.0
Base Index July 1973 103.6
Increase in Index 6.4

Percent of Increase in Index
6.4 ÷ 103.6 = 6.18% 6.18% × $1.215 per ton = $.0751 increase per ton

Percent of Increase — Ammonium Nitrate
Price Per Hundred Pounds Bulk Ammonium Nitrate
Average Price for the Month of July, 1973 $2.90

Average Price for the Month of January, 1974	6.31
Increase in Price	$3.41

Percent of Increase — $3.41 ÷ $2.90 = 117.58%

Increase Per Ton for Ammonium Nitrate

117.58% × $.18 = $.2116 increase per ton

Percent of Increase — Diesel Fuel

Price Per Gallon

Average Price for the Month of July, 1973	$ .170
Average Price for the Month of January, 1974 including $.04 per gallon for on job distribution	.339
Increase in Price	$ .169

Percent of Increase — $.169 ÷ $.170 = 99.41%

Increase Per To for Diesel Fuel

99.41% × $.105 = $.1044 increase per ton

Total Price Per Ton Increase Due January 1, 1974 . . . . . .

Increase Per Index Formula	$.0751 per ton
Increase for Ammonium Nitrate	$.2116 per ton
Increase for Diesel Fuel	$.1044 per ton
Total Increase	$.3911 per ton

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Petition For A Writ Of Certiorari upon counsel for Respondent by depositing same in the United States Mail with adequate postage thereon in envelopes addressed as follows:

W. STUART MCCLOY, ESQ.
McCloy, Dudley, Yawn & McCloy
1701 First National Bank Building
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and

JOHN SCOTT MCGAW, ESQ.
Moore, Morrow, Frymier & McGaw
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P. O. Box 695
Madisonville, Kentucky 42431

This day of March, 1976.

MICHAEL C. MURPHY
Counsel for Petitioner,
Georgia Power Company

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Atlanta, Georgia 30303

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1272

GEORGIA POWER COMPANY, - - Petitioner,

versus

CIMARRON COAL CORPORATION, - Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1272

GEORGIA POWER COMPANY - - - - *Petitioner,*

v.

CIMARRON COAL CORPORATION, - - - *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

The Respondent, Cimarron Coal Corporation, respectfully urges that the Petition for Writ of Certiorari should be denied.

Judgment was entered December 9, 1975, upon the Opinion of The United States Court of Appeals For The Sixth Circuit and issued as Mandate on March 5, 1976 (A C-3, *infra*). No rehearing or reconsideration of the Court's Judgment has been sought, or, stay of Mandate applied for, by Petitioner under 28 U.S.C., Section 2101 as provided in Rule 41 Federal Rules of Appellate Procedure and Rule 51 of this Honorable Court.

The Respondent cannot proceed to arbitration with Petitioner in accordance with the Mandate in view of the pending Petition for Certiorari for which the lower Courts have recognized deference.

Respondent accepted and accepts the Opinion and Judgment of The Court of Appeals upon the appeal and cross-appeal in the lower Court *upon equitable principles* because the application by the Trial Court of its historic equity powers in the declaratory judgment action under 28 U.S.C., Sections 2201 and 2202, despite the remedies at law sought by both Petitioner and Respondent, in order to mold its decree as to do complete justice and declare the existence or non-existence of any right, duty, status and other legal relations of the parties or of any fact upon which such legal relations depend appeared proper whether or not further relief is or could be sought. Cf. Rule 57, Federal Rules of Civil Procedure; Supreme Court Advisory Committee, Sub. Rule 57.

A failure to apply for stay clearly invites uncertainty as to the filing of a Cross-Petition and if this Court should grant the Petition upon strict legal principles then the legal issue with respect to Petitioner's admitted refusal to arbitrate as a condition precedent to any legal remedy and Respondent's right to rescind therefor are so interrelated that special and important reasons exist for this Court to focus its attention to those issues and exercise its sound discretion to review the entire case to avoid injustice to Respondent. A summary of cases upon these issues will appear at the Conclusion to this Brief.[1]

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[1]Cf. Stern, When To Cross-Appeal or Cross-Petition—Certainty or Confusion? 87 Harvard L. Rev. 763 (1974); Rule 19, permits this Court to determine the scope and extent of its review where prejudice is likely to result; *Dandridge* v. *Williams*, 397 U. S. 471, 90 S. Ct. 1153 (1970).

This litigation at the Trial level, involved four (4) hearings; over sixty-one (61) exhibits and testimony *ore tenus* covering the period April, 1970 to November, 1974, all of which is presented in two (2) printed volumes and one (1) transcript (April 11, 1975) containing over eight hundred (800) pages. This entire record was before the Trial Court and The Court of Appeals at their moments of decision.

Upon the record before it the Trial Court fairly examined the course of conduct of the parties over the period 1970 to 1974 and the manifest written expression of the parties, i.e. the Coal Supply Agreement and determined that the intention of the parties was to arbitrate any unresolved controversy arising under the agreement. In doing so the Trial Court, noting that there was no real dispute about the facts (Pet. A-16), could not accept Petitioner's attempts (Pet. A-18) to have the Court determine intent from one (1) isolated paragraph of one (1) provision of a coal supply agreement containing some thirty-seven (37) provisions in all, which taken together constituted a coherent and entire contract.

The Coal Supply Agreement dated February 6, 1969, was executed two (2) years after this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U. S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) and clearly evidenced a transaction in commerce as contemplated by The Federal Arbitration Act, 9 U.S.C., Sec. 1, *et seq.* The parties dealt with arbitration in the contract which contained a broad arbitration clause applicable to "any unresolved controversy between the parties, arising under this Agreement . . ." It also contained a provision making arbitration a condition precedent to all other remedies provided by law. An unresolved controversy

existed and the Petitioner admittedly refused to arbitrate (Vol. II, R-484).

Upon issues defined and agreed upon in open Court by the parties (Vol. II, R-483 to 486; Transcript, April 11, 1975, pp. 25-28) the Trial Court and The Court of Appeals have held against the Petitioner on the issue of arbitration.

Respondent therefore urges that the Memorandum Findings of Fact and Conclusions of Law of the Trial Court (Pet. A-14 to A-20) which were not found clearly erroneous by The Court of Appeals in its Opinion and Judgment (Pet. A-1 to A-13) justify affirmance of The Court of Appeals by this Court.

Finally, whether Respondent recovers any award from the Petitioner through arbitration is entirely dependent upon the conclusion of arbitration upon Respondent's claim which was a necessary predicate to its demands for arbitration to be conducted in accordance with tne Commercial Arbitration Rules of the American Arbitration Association and any award is subject to vacation under the supervision of the Courts if procured by fraud, undue means, partiality or corruption, misconduct, misbehavior, or abuse of power. Federal Arbitration Act, 9 U.S.C., Sec. 1, *et seq.*, Sections 9 and 10. The Petitioner in these proceedings has been and is the financially stronger party and any claim that arbitration constitutes injury is unsupported in the context of the record of this case, The Federal Arbitration Act and the applicable case law.

QUESTIONS PRESENTED

Respondent is dissatisfied with Petitioner's presentation of the questions for review because the first question assumes *arguendo* elements of this case, such as intent and non-justiciability which are clearly inconsistent with the record and the Judgments of the lower Courts. Its second question also presents a question of fact which has already been determined by both lower Courts.

So far as evidence of intent or any matter of fact is concerned, the Petitioner rested its case in the Trial Court and questioned only the exclusion of evidence tendered on the issue of gross inequity which the Trial Court and The Court of Appeals held was the issue to be arbitrated (Pet. A-11, A-12 and A-19). Petitioner at that time thought "gross inequity" was justiciable by the Trial Court and this is inconsistent with its first question.

Petitioner's second question addresses itself to the fact of whether the language of the first paragraph of Section 26.01 viewed in a vacuum or out of the context of the entire contract and the course of dealings between the parties excluded gross inequities adjustments from arbitration. Again this was determined adversely by the lower Courts. The Petitioner's captious semantics as it deals with Section 26.01 on the issue of intent (Pet. 9, 10, 19, 20) must not be allowed to obfuscate the plain bargained-for language of the Coal Supply Agreement, and are unsupported by the entire record.

Correctly and fairly stated the issues are:

Whether The Court of Appeals in its Opinion reported at 526 F. 2d 101 (6th Cir. 1975) has:

(a) Rendered a decision in conflict with the decision of another Court of Appeals on the same matters

or

(b) Decided an important questiton of federal law which has not been, but should be settled by this Court.

STATEMENT OF FACTS AND OF THE CASE

No Statement of Facts or of the case is necessary because the facts and circumstances applicable to this case are those contained in the Memorandum Findings of Fact of The Trial Court (Pet. A-14 to A-20) which were affirmed by The Court of Appeals (Pet. A-1 to A-13) and are adopted by this Respondent.

Respondent also relies upon the foregoing with the following elaboration.

The Coal Supply Agreement dated February 6, 1969, contained the following arbitration clause (Pet. B-17):[2]

> 20.01 Arbitration. *Any unresolved controversy between the parties, arising under this Agreement shall, at the request of either party, be submitted to arbitration under the rules of The American Arbitration Association.* The costs and expenses of any arbitration shall be shared equally by the parties, unless otherwise ordered by the Arbitrator. (Emphasis supplied.)

[2]This Agreement was executed two (2) years after the decision of this Court in the *Prima Paint* case, *supra*, four (4) years after the decision in *Necchi S.p.A.* v. *Necchi Sewing Machine Sales Corp.*, 348 F. 2d 693 (2d. Cir. 1965), cert. denied, 383 U. S. 909 (1966); and ten (10) years after the decision in *Robert Lawrence Co.* v. *Devonshire Fabric, Inc., supra.* Arbitration as a condition precedent to all other remedies has long been recognized as a major consideration for the execution of a contract. Cf. *Hamilton* v. *Liverpool and London and Globe Ins. Co.*, 136 U. S. 242, 255, 10 S. Ct. 945, 34 L. Ed. 419 (1890); *Hamilton* v. *Home Insurance Co. of New York*, 137 U. S. 370 (1890); *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corporation*, 70 F. 2d 297 at 299 (2d. Cir. 1933) aff'd 293 U. S. 449, 56 S. Ct. 313 (1935); *Kulukundis Shipping Co. S/A* v. *Amtorg Trading Corporation*, 126 F. 2d 978 at p. 984, 987 (2d. Cir. 1952).

It also contained the following provision requiring arbitration as a condition precedent to any other remedy under the contract (Appendix to Petition B-18):

> 22.01 Remedies Cumulative. Remedies provided under this Agreement *shall be* cumulative and in addition to other remedies provided by law, *provided all such remedies shall be subject to the preceding requirement of arbitration.* (Emphasis supplied.)

The Coal Supply Agreement also contained, among other provisions dealing with adjustments thereunder, a provision for adjustments not contemplated by the parties at the time of the execution of the Agreement which is as follows (Pet. B-19-20):

> 26.01 Adjustments for Gross Inequities. Any gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of execution of this Agreement *may be* corrected by mutual consent. Each party *shall* in the case of a claim of gross inequity furnish the other with whatever documentary evidence *may be* necessary to assist in effecting a settlement. *Nothing contained in this Section shall be construed as relieving either the Purchaser or the Seller from any of its respective obligations hereunder solely because of the existence of a claim of inequity or the failure of the parties to reach agreement with respect thereto.* (Emphasis supplied.)

Finally, the Coal Supply Agreement was confined to its terms by the following provision (Pet. B-20):

> 28.01 Entire Agreement. This instrument contains the entire Agreement between the parties, and *there are no representations, understandings or agreements, oral or written, which are not included herein.* This

> Agreement cannot be changed except by duly authorized representatives of both parties in writing. (Emphasis supplied.)

In January 1974, Respondent, having received a request for escalation of coal deliveries under Section 7.01, expressed its concern over its ability to make those deliveries and the economic conditions rapidly increasing the cost of coal in the market, and requested a price adjustment under Section 26.01. This request was adamantly rejected by the Petitioner. In the Fall of 1974, upon Petitioner's rejection of its repeated request for a price adjustment, Respondent demanded arbitration under Section 20.01 and Petitioner refused. After an exchange of urgent communications, Petitioner filed its original Complaint against Respondent and sought damages for Respondent's alleged failure to deliver 355,977.60 tons of coal which Respondent would be required to replace under Section 27.01 (Pet. B-20):

> 27.01 Replacement Coal. In the event Seller fails to produce and tender for delivery coal from the reserves dedicated herein an amount of coal sufficient to meet the delivery requirements hereunder for the primary period, or any applicable option period, *Seller will supply coal of equal quality from other sources and upon the same terms and conditions herein.* (Emphasis supplied.)

Although Petitioner had known since January, 1974, that Respondent, due to economic conditions causing increases in the market price of coal as well as shortages of equipment, lacked equipment to meet its escalated deliveries it had never released Respondent from its obligation therefor, and Respondent's exposure to replace this coal in the Fall of 1974 at the then prevailing market prices was

in excess of $10,000,000.00 or more than Respondent's net worth.

Respondent at all times before Petitioner's suit and thereafter in the Trial Court was willing to deliver its coal if Petitioner would just agree to arbitrate its claims and Petitioner's original Complaint, if sustained, would have crushed Respondent. Petitioner had not invited Respondent to a "pink tea party" by adamantly refusing to arbitrate and suggesting that Respondent sue Petitioner for "breach" or "to compel arbitration" (Vol. II, P. Exhibit 47, R-630-631, R-373-374).

Petitioner thereafter filed an Amended and Substituted Complaint seeking the equitable remedy of Declaratory Judgment for its protection by the Court on the issues of arbitrability and its breach for failure to arbitrate.

The parties agreed to a Status Quo Order (Vol. I, R-256-258; R-267-268).

It is in this context that the litigation was conducted on the merits as disclosed by the substantial record and numerous exhibits with the Trial Court invoking its general equitable power and the historical justness of equity to sustain Petitioner on all issues except the issue of arbitrability.

At the trial it was shown that Petitioner had a fuel adjustment clause in its rate structure that passes added fuel costs on to the consumer (Pet. p. 9). On Respondent's Motion for New Trial heard and denied April 11, 1975 (A C-1 to A C-2 *infra*) it was also shown that Petitioner during the Court proceedings claimed and was passing on to its customers the price adjustment of $6.50 per ton Respondent had sought before the Complaint was filed, but which Petitioner refused to pay to, or arbitrate with, Respondent and was required by The Public Service Commission of Georgia to refund upon discovery that the price

increase was not being paid to Respondent (Transcript April 11, 1975 page 21; Vol. II, R-801 to 807). Thus Petitioner's *ex post facto* gratuitous statement as to any special purpose for one paragraph of Section 26.01 (Pet. p. 9) warps the record and deprives the contract of mutuality of remedy so explicitly provided therein.

Appeal and Cross-Appeal were duly taken.

REASONS FOR OPPOSING THE WRIT

This case is controlled by the Federal Arbitration Act of 1925, 9 U.S.C., Sections 1 to 14 (1970). The Coal Supply Agreement here, entered into in 1969 for a long term of ten (10) years from January 1, 1970, evidenced a transaction involving commerce. The contract contained a written provision to settle by arbitration any unresolved controversy thereafter arising out of such contract. This provision was valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. An unresolved controversy existed which Petitioner refused to arbitrate (Vol. II, R-484). Arbitration under Section 20.01 was made a condition precedent to all other remedies by Section 22.01 and the second paragraph of Section 26.01 required the parties to observe all other provisions of the Agreement in case of a failure to reach agreement. These provisions, together with the course of conduct of the parties under the Agreement fully supported the Trial Court and The Court of Appeals in their fair and reasonable interpretation of the Coal Supply Agreement and their determination of the parties' intention to settle that unresolved controversy by arbitration if the parties could not reach any agreement thereon (Pet. A-6 to A-10).

The Court of Appeals has applied no rule of decision and made no determination which is not in complete con-

formity with the clear legislative policy of the Congress, the prior decisions of this Court, or, which is in conflict with any controlling decision of The Court of Appeals for the Second Circuit.

Finally, although almost ten (10) years has passed since *Prima Paint*, the decision has gained almost universal acceptance as declaratory of the national substantive law and the power of Congress to prescribe how federal Courts are to conduct themselves with respect to commercial arbitration, over which Congress plainly has the power to legislate, intended to promote fair dealing and the early resolution of disputes. All of the purposes for The Federal Arbitration Act which existed in 1925 to serve businesses engaged in commerce exist to a greater degree today. Arbitration was a crucial part of the consideration for this long term commercial contract entered into by Respondent and by Petitioner and necessary for an effective and continuing relationship.[8]

Arbitration clauses have appeared in coal supply agreements for many years. Cf. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corporation*, 70 F. 2d 297 (2d. Cir. 1933) affirmed 293 U. S. 449, 59 S. Ct. 313 (1935). The Trial Court, which exercises its jurisdiction in The West Kentucky Coal Field, said in this case (A-18; Cf. Vol. II, R-516):

> "There is no magic to price adjustments in this long-term coal contract and certain types of adjustments have been provided under this contract. There is no

[8]See Aksen, Legal Considerations in Using Arbitration Clauses to Resolve Future Problems Which May Arise During Long Term Business Agreements. Symposium—Presented at Annual Meeting of American Bar Association, San Francisco, California, August 16, 1972; Committee on Commercial Arbitration, Section of Corporation, Banking and Business Law, *The Business Lawyer*, January, 1973, pages 595-603.

claim or argument advanced by plaintiff that the price adjustments initially provided for, or subsequently provided for by amendments under 3.02, 3.03 and 3.04 would not have been subject to arbitration had the parties been unable to mutually agree thereon; so it seems to us that the fact that an adjustment under the gross inequity clause 26.01 not being arbitrable, as plaintiff would argue claiming such to be rewriting of the agreement, does not hold water—particularly where this agreement was drafted by the plaintiff, who, if it was not the intent of the parties that 26.01 be subject to arbitration, could have simply provided that 26.01 was not arbitrable. There is no provision to that effect."

This brings us to the consideration of the opinion of The United States Court of Appeals For The Sixth Circuit and its alleged conflict, if any, with the opinion of The Court of Appeals for the Second Circuit in the case of *Necchi S.p.A.* v. *Necchi Sewing Machine Sales Corp.*, 348 Fd. 693 (2d. Cir. 1965), cert. denied 383 U. S. 909 (1966).

Briefly, The Court of Appeals made the correct and proper application of *American Home Assurance Co.* v. *American Fidelity & Casualty Co.*, 356 F. 2d 690 (2d. Cir. 1966); *Aeronaves de Mexico S.A.* v. *Triangle Aviation Services, Inc.*, 389 F. Supp. 1388 (SD NY 1974) aff'd. 515 F. 2d 504 (2d. Cir. 1975) and *Beech Aircraft Corp.* v. *Ross*, 155 F. 2d 615 (10th Cir. 1946) and made a correct and proper distinction between the *Necchi* case and this case (Pet. A-7 to A-9):

"The present case is quite different from *Necchi*. There the parties sought to enforce a provision *for renewal* which did no more than require the parties to examine *the possibility of* entering into a new agreement. The dispute did not concern operations under the agreement and the language of the *renewal* provi-

sion presented nothing for the arbitrator, or a Court, to enforce. On the other hand, in the case now under review a dispute arose during the life of a subsisting contract with respect to a present adjustment in prices on the basis of a condition *that was recognized by the parties* as a possibility when the contract was entered into. There is a difference between a provision which requires parties to attempt to agree on a new contract and one which requires them to attempt to (A-8) make an adjustment in price under an ongoing contract by mutual consent. Under the former situation in the absence of a new agreement there is no contract to enforce either by arbitration or judicial proceedings. In the latter case the parties remain bound to continued operations under their contract and the controversy over a claimed right to price adjustment must be settled somehow in the absence of mutual consent. In such a case if the contract provides for arbitration, the arbitrator is only required to resolve a controversy arising under the agreement of the parties, not write a new agreement for them.

"The mere fact that it provided for correction of gross inequities by mutual consent did not remove Section 26.01 from arbitrability. The *Necchi* Court has so held in cases where the fashioning of a renewal was not involved. In *American Home Assurance Co.* v. *American Fidelity & Casualty Co.*, 356F.2d.690(2d. Cir.1966), a contractual provision for a reduction of reinsurance premiums 'on a basis to be mutually arranged' was held to be arbitrable. In *Aeronaves de Mexico S.A.* v. *Triangle Aviation Services, Inc.*, 389F. Supp.1388(S.D. N.Y. 1974) aff'd 515 F.2d.504(2d Cir. 1975), a dispute under a provision that increases in charges for servicing airplanes 'will be negotiated to the satisfaction of both parties' was held to be arbitrable. Georgia Power's reliance upon *Beech Aircraft Corp.* v. *Ross*, 155 F.2d.615 (10th Cir. 1946) is misplaced. The contract under consideration in that case contained no arbitration provision. Under those cir-

cumstances the Court held that a provision for price changes to be effected by 'mutual agreement', in the absence of a formula for final revision of price did not provide an acceptable standard by which a Court (A-9) could give effect to the intentions of the parties. The reasoning of the Court in the *Beech Aircraft* decision does not compel the same result in this case where the parties have agreed in advance to submit unresolved controversies to arbitration."

The holding of the Trial Court was to the same effect (Pet. A-17):

> "No one quarrels, least of all we, that for a dispute to be arbitrable there must have been a contractual agreement to arbitrate; however, the modern tendency seems to be that on the issue of what was agreed to be arbitrated, if 'fairly debatable' or 'reasonably in doubt', then such should go to arbitration. *Butler, supra.* Likewise, no one quarrels with the proposition, as expressed in the law of Georgia cited by the Plaintiff, and also in the *Necchi* v. *Necchi Sewing,* 348 F.2d.693, a contract to make a contract is not enforceable, but such is not the case here."

It is obvious that Petitioner has misjudged the *ratio decidendi* of the commercial arbitration cases. The *Necchi* case fully supports Respondent's case. Although *Necchi* dealt with the possibility of renewals *it also dealt with and sustained as arbitrable matters those disputes arising under the contract.* It recognized in 1965 (certiorari was denied in 1966) the Supreme Court's explicit and unanimous reservation of the question of arbitrability for the Courts (p. 696).

Two (2) years before the Coal Supply Agreement was executed, *Prima Paint, supra,* clearly established: that the Federal Arbitration Act created a "national substantive

law" governing even in the face of contrary state law; that a purpose was to make arbitration agreements as enforceable as other contracts but not more so; and, that a lower federal Court should determine: first, the question of whether the agreement is the kind of agreement specified in The Federal Arbitration Act; second, the issues relating to the making and performance of the agreement to arbitrate; and third, to apply the rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power. Hence, upon the basis of *Prima Paint, supra,* contracts involving commerce which contained arbitration clauses, previously treated as second class contracts because of the hostility of the Courts, are now upon a par with other contracts in order to bring good faith to the market place and avoid welching at the whim of a recalcitrant party which desires that its dispute be subject to delay and obstruction in the Courts the exact opposite of what *Prima Paint, supra* (p. 404), honored as the plain meaning and unmistakable clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the Courts.

A succession of cases from The Second Circuit brought about the elevation of second class commercial contracts to the status of other contracts. Judicial hostility and State law had posed problems up until *Prima Paint's* clear acceptance of the "national substantive law" of commercial arbitration. The State of Georgia in *West Point-Pepperell, Inc.* v. *Multi-Line Industries, Inc.,* Ga., 201 S. E. 2d 452 (1973) cited in Judge Lively's opinion (Pet. A-12) *recognized the preemption of The Federal Arbitration Act and yielded its state law and policy on arbitration to the paramount federal law one (1) year before this litigation was instituted by Petitioner in the Trial Court where Petitioner*

argued that the law of Georgia prevented arbitration (Vol. II, R-484, R-485, R-486).

If arbitration under Section 20.01 of any unresolved controversy arising under any provision of the Coal Supply Agreement including Section 26.01 was contrary to Georgia law and not arbitrable as argued by Petitioner then it was deceptive and misleading for Petitioner to include the language in the Agreement without affirmative exclusory provisions.

In the series of Second Circuit cases culminating in *Prima Paint,* are: *Shanferoke Coal & Supply Co.* v. *Westchester Service Corp.,* 70 F. 2d 297 (2d. Cir. 1933) affirmed 293 U. S. 449, 56 S. Ct. 313 (1935); and, *Bernhardt* v. *Polygraphic Co. of America,* 218 F. 2d 948 (2d. Cir. 1955), reversed 350 U. S. 198, 76 S. Ct. 273 (1956). Other cases from the Second Circuit were: *Kulukundis Shipping Co. S/A* v. *Amtorg Trading Corporation,* 126 F. 2d 978 (2d. Cir. 1952); *Albatross SS Co., Inc.* v. *Manning Bros., Inc.,* 95 F. Supp. 459 (SD NY 1951); *Robert Lawrence Co.* v. *Devonshire Fabric, Inc.,* 271 F. 2d 402 (2d. Cir. 1959), certiorari dismissed under Rule 60, 364 U. S. 807 (1960); and, the *Necchi* case (1965) discussed above. These cases hold that the District Court has jurisdiction to determine whether the parties had made an agreement to arbitrate and whether the issues raised are within the reach of the agreement; address themselves to the history and policy of the Federal Arbitration Act and the prior decisions of this Court; and suggest a liberal policy to promote arbitration to accord with the original intention of the parties and to help ease the current congestion in Court calendars. It is in the *Necchi* case that the Second Circuit cites (p. 696) the cases of *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U. S. at 582, 80 S. Ct. at 1353 (1960) and *John Wiley & Sons, Inc.* v. *Livingston,* 376 U. S. 543, 547, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964)

in support of the principle that arbitration in collective bargaining and in commercial contract cases is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.

Petitioner concedes (Pet. 19) the strong federal policy supporting arbitration in both fields and concedes the presumption favoring the arbitration of disputes and then argues (Pet. 19-21) that the language of the first paragraph of Section 26.01 provides "positive assurance" that it was to be excluded from and withdrawn from, the broad provision of Section 20.01. This challenge to the Sixth Circuit's opinion *has no support in the record* or in the language of Sections 20.01, 22.01, 26.01 (2nd par.) and 28.01 of the Coal Supply Agreement *which clearly provided both lower Courts with "positive assurance" of arbitrability.* It was clear that arbitration under the second paragraph of Section 26.01 was an obligation of the parties, that arbitration was a condition precedent under Section 22.01, and, that arbitration applied to any unresolved controversy under Section 20.01. *It is unnecessary for this Honorable Court to sit at nisi prius on the issue of intent to arbitrate which has already been resolved by both lower courts.*

Petitioner cites no case decided since *Prima Paint* and there are only three significant cases for consideration. These are *Necchi, supra; Prima Paint, supra,* and *West Point-Pepperell, Inc.* v. *Multi-Line Industries, Inc.,* Ga., 201 S. E. 2d 452 (1973) the latter case completely rebutting all of Petitioner's arguments in the Trial Court that state law was applicable (Vol. II, R-484 to R-486).

Petitioner cites two (2) law review articles which are more deserving of the label *"ipse dixit"* than the unanimous opinion of three (3) member panel of The Sixth Circuit to which Petitioner has ascribed it (Pet., p. 12). The article at 52 Boston L. Rev., 571 (1972) was designed to provide

legal and equitable defenses for recalcitrant clients (footnote 21, p. 575):

> *"When a client becomes recalcitrant as to the performance of his agreement to arbitrate or denies having made the agreement to arbitrate the present dispute, his attorney may feel his cause is better served by suit in Court with the attendant protection of judicial proceedings. Therefore, ability to defend against these motions and to foresee the interpretation of an agreement to arbitrate may assume significance."* (Emphasis supplied.)

Petitioner also failed to follow the article as to its conclusory admonishment (p. 598):

> ". . . *Real protection for a client, however, can only be afforded at the drafting stages."* (Emphasis supplied.)

The other law review article, 1 Ga. L. Rev. 363 (1967) was written without benefit of *Prima Paint, supra,* and assumed a judicial hostility toward arbitration in commercial contracts apparently endorsed by Petitioner who refers (Pet., p. 9) to it as the ". . . *free wheeling environment of an arbitration proceeding* . . ." This attitude has no place under the Federal Arbitration Act or the applicable case law.

The opinion of The Court of Appeals For The Sixth Circuit is not at conflict with any decision of the Second Circuit or of this Honorable Court and this Court in *Prima Paint* has spoken clearly and unmistakably as to the role of the lower Courts in commercial arbitration matters. It is clear that the Trial Court and The Court of Appeals have observed that role in this case, having fairly determined the intent of the parties to arbitrate their dispute from evidence, contract language and tests that are applicable to contracts generally.

CONCLUSION

The Petition For Certiorari should be denied.

Because arbitration was a condition precedent to legal remedy under the Coal Supply Agreement, Respondent's defense of rescission for repudiation or breach of contract was based upon the cases of *Hamilton* v. *Liverpool and London and Globe Ins. Co.* (*supra,* footnote 2); and *Hamilton* v. *Home Insurance Co. of New York,* 137 U. S. 370 (1890). This defense was within the scope of the *Jureidini* doctrine (1915) referred to first in *The Atlanten,* 252 U. S. 313, 40 S. Ct. 32, 64 L. Ed. 581 (1920); was not passed upon by the Second Circuit or this Court in the *Shanferoke* case, *supra;* and was discussed as an open question by the Second Circuit in *Kulukundis, supra;* Cf. *Galt* v. *Libby-Owens-Ford Glass Co.,* 376 F. 2d 711 (2d. Cir. 1967).

Respondent accepted the equitable principles applied by the lower Courts to its defense of rescission because of Petitioner's prior breach based upon their power under the Federal Rules of Civil Procedure in a declaratory judgment action. Respondent does not agree with the lower Court's reasoning as to its legal defense of rescission. Therefore, equity in this case follows the law and should the Petition be granted, Respondent asks that this Honorable Court exercise its sound judicial discretion to hear it as to the legal defense of rescission.

Respectfully submitted,

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APPENDIX

APPENDIX "C"

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

GEORGIA POWER COMPANY,
Plaintiff,
v.
CIMARRON COAL CORPORATION,
Defendant.
} Civil No. C 74-107-0

ORDER

This matter came on for hearing on Friday, April 11, 1975, at Owensboro, Kentucky, on the defendant's motion for a new trial and question of record designation on appeal and there appeared Hon. Martin Roach and Hon. Michael C. Murphy on behalf of the plaintiff and Hon. William Nisbet, Hon. W. Stuart McCloy, Sr., and Hon. W. Stuart McCloy, Jr. on behalf of the defendant.

Both sides having announced ready and having presented their arguments, and the Court being sufficiently advised,

IT IS ORDERED that the defendant's motion for a new trial be, and it hereby is, OVERRULED.

Order

IT IS FURTHER ORDERED that nothing shall be designated and included in this record by the Clerk that was not filed and introduced into the record on the trial date.

JAMES F. GORDON
United States District Judge

April 11, 1975

ENTERED April 11, 1975,
August Winkenhofer, Jr.,
Clerk
by W. Hatcher, Deputy
Clerk.

Copies to: Hon. Martin Roach
Hon. Michael C. Murphy
Hon. J. Kirk Quillan
Hon. W. Stuart McCloy, Sr.
Hon. W. Stuart McCloy, Jr.
Hon. Richard L. Frymire
Hon. William Nisbet

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

GEORGIA POWER COMPANY, *Plaintiff,*
v.
CIMARRON COAL CORPORATION, *Defendant.*
} Civil No. C 74-107-0

AGREED DESIGNATION OF RECORD

After a hearing on April 11, 1975, the plaintiff and the defendant agreed on a designation of the record. The parties agreed that all items listed as docket entries except the following docket entries shall be included in the record on appeal in the case:

No. 20 through 24 excluded.
No. 26 through 36 excluded.
Tendered Proposed Findings of Fact and Conclusions of Law.

This April 11, 1975.

AGREED TO:
MICHAEL C. MURPHY, Attorney for Plaintiff
W. STUART MCCLOY, SR., Attorney for Defendant.

Agreed Designation of Record

FILED
AUGUST WINKENHOFER, JR., Clerk
April 11, 1975
U. S. District Court
Western District of Kentucky

FILED
Dec. 9, 1975
John P. Hehman, Clerk

FILED
August Winkenhofer, Jr.
Clerk
March 10, 1976
U. S. District Court
Western Dist. Kentucky

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 75-1542
75-1543

GEORGIA POWER COMPANY, - - *Plaintiff-Appellant, Cross-Appellee,*

v.

CIMARRON COAL CORPORATION, - *Defendant-Appellee, Cross-Appellant.*

Before: PHILLIPS, Chief Judge; MILLER and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxes.

ENTERED BY ORDER OF THE COURT.
John P. Hehman, Clerk

Issued as Mandate: March 5, 1976
COSTS: None

A True Copy.
Attest:
Darlene Koenig, Deputy Clerk

CERTIFICATE OF SERVICE

This is to certify that I have this day served Counsel for Petitioner in the foregoing matter with three copies of Brief for Respondent in Opposition by depositing same in The United States Mail with adequate postage thereon, addressed to:

Allen E. Lockerman
Michael C. Murphy
J. Kirk Quillan
Ralph H. Greil
Troutman, Sanders, Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

and

Martin Roach, Esquire
Roach, Cox & Brown
2615-16 Citizens Plaza
Louisville, Kentucky 40202

this 2nd day of April, 1976.

(s) W. Stuart McCloy, Sr.
Attorney for Respondent
Cimarron Coal Corporation

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1272

GEORGIA POWER COMPANY,
Petitioner,

vs.

CIMARRON COAL CORPORATION,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

ALLEN E. LOCKERMAN
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& Ashmore
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1272

GEORGIA POWER COMPANY,
Petitioner,

vs.

CIMARRON COAL CORPORATION,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondent's Brief in Opposition to Writ of Certiorari raises for the first time two procedural issues.

1.

Whether the Petition for Certiorari met the procedural prerequisites for jurisdiction of this Court.

Respondent notes on page 1 of its brief that the Petitioner did not file with the Court of Appeals for the Sixth Circuit either a Petition for Rehearing or a Motion to Stay the Mandate. It is clear that a Petition for Rehearing to the Court of Appeals pursuant to Rule 40, Federal Rules of Appellate Procedure, is permissive and is not a jurisdictional prerequisite to filing a Petition for Writ of Certiorari. 28 U.S.C. §2101; Rule 21, Rules of the Supreme Court of the

United States; 9 Moore's Federal Practice, ¶201.01[3], pp. 518-20 and ¶201.04, pp. 521-22. The only significance of filing a Petition for Rehearing to the Court of Appeals is to extend the time within which a Petition of Certiorari must be filed with this Court. *Id.* A Motion to Stay the Mandate pursuant to Rule 41, Federal Rules of Appellate Procedure, is also permissive and not a jurisdictional prerequisite for a Petition for Writ of Certiorari in this Court. 28 U.S.C. §2101(c); Rule 21, Rules of the Supreme Court of the United States, 9 Moore's Federal Practice, *supra.*

A Motion to Stay the Mandate in the Court of Appeals was not necessary or appropriate in the instant case, because the Court of Appeals affirmed the trial court's judgment, which maintains a status quo order in effect pending a final determination of the merits of the case on appeal. (Pet. A14-A20; A21; A23). The judgment affirmed by the Court of Appeals, therefore, is effectively stayed pending a final disposition of the case on Petition for Writ of Certiorari by this Court, thus avoiding any possibility of mootness, as suggested on page 2 of Respondent's Brief in Opposition.

2.

Whether the Respondent waived any right to Petition for Certiorari.

Respondent urges this Court to consider issues not raised by the Petition for Writ of Certiorari and offers an apology for failing to file a "cross-petition" as to such other issues. Respondent had the opportunity to petition this Court for Writ of Certiorari in a time and manner provided by law, 28 U.S.C. §2101, and by the

Rules of this Court, Rules 19-27. There is no merit in Respondent's characterization that the specific issues raised in the Petition for Writ of Certiorari are "equitable" principles as opposed to the "legal" defense urged by Respondent of recision of the contract because of a prior breach by the Petitioner. Naturally, upon granting the Petition for Writ of Certiorari, this Court can determine the issues and scope of review it deems appropriate under the applicable facts and law of the instant case.

Respondent's random references to facts and argument regarding its defense of recision are misplaced and have no bearing on the urgency and necessity of this Court accepting review of the instant case on the grounds set forth in the Petition for Writ of Certiorari.

Respectfully submitted,

ALLEN E. LOCKERMAN
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Atlanta, Georgia 30303

MARTIN ROACH
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Louisville, Kentucky 40202
Counsel for Petitioner
Georgia Power Company

J. KIRK QUILLIAN
RALPH H. GREIL
Troutman, Sanders, Lockerman
& Ashmore
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Reply to Brief in Opposition to Writ of Certiorari upon counsel for Respondent by depositing same in the United States Mail with adequate postage thereon in envelopes addressed as follows:

W. STUART MCCLOY, ESQ.
McCloy, Dudley, Yawn & McCloy
1701 First National Bank Building
Memphis, Tennessee 38103

and

JOHN SCOTT MCGAW, ESQ.
Moore, Morrow, Frymier & McGaw
Kentucky Bank and Trust Building
P. O. Box 695
Madisonville, Kentucky 42431

This day of April, 1976.

MICHAEL C. MURPHY
Counsel for Petitioner,
Georgia Power Company

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